Index

Judicial Review

Acknowledgment of Service

Name of court

High Court of Justice
Administrative Court

Claim number

C0/2372/2021

Name of claimant (including any reference)

FEWS LANE CONSORTIUM LTD

Name of defendant

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL

Interested parties

LANDBROOK HOMES LTD

This Acknowledgment of Service is filed on behalf of

Name

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL

who is the

- [x] Defendant
- [ ] Interested party

Name and address of person to be served

Name

FEWS LANE CONSORTIUM LIMITED

Address

Building and street

THE ELMS

Second line of address

FEWS LANE

Town or city

LONGSTANTON

County (optional)

CAMBRIDGESHIRE

Postcode

C B 2 4 3 D P

Section A

Tick the appropriate box

- [x] I intend to contest all of the claim
  – complete sections B, C, D and F
- [ ] I intend to contest part of the claim
  – complete sections B, C, D and F
- [ ] I do not intend to contest the claim
  – complete section F
- [ ] The defendant (interested party) is a court or tribunal and intends to make a submission
  – complete sections B, C and F
- [ ] The defendant (interested party) is a court or tribunal and does not intend to make a submission
  – complete sections B and F
- [x] The applicant has indicated that this is a claim to which the Aarhus Convention applies
  – complete sections E and F
- [ ] The Defendant asks the Court to consider whether the outcome for the claimant would have been substantially different if the conduct complained of had not occurred (see s.31(3C) of the Senior Courts Act 1981)
  – A summary of the grounds for that request must be set out in/accompany this Acknowledgment of Service

Note: If the application seeks to judicially review the decision of a court or tribunal, the court or tribunal need only provide the Administrative Court with as much evidence as it can about the decision to help the Administrative Court perform its judicial function.

Section B

B1. Insert the name and address of any person you consider should be added as an interested party.

1. Name

LANDBROOK HOMES LTD

Address

Building and street

36A CHURCH STREET

Second line of address

Town or city

WILLINGHAM

County (optional)

CAMBRIDGE

Postcode

C B 2 4 5 H T

Phone number

07878 128669

Email (if you have one)

gerry.caddoo@landbrookhomes.co.uk

2. Name

Address

Building and street

Second line of address

Town or city

County (optional)

Postcode

Phone number

Email (if you have one)

Section C

Summary of grounds for contesting the claim. If you are contesting only part of the claim, set out which part before you give your grounds for contesting it. If you are a court or tribunal filing a submission, please indicate that this is the case.

PLEASE SEE ATTACHED.

Section D

D1. Give details of any directions you will be asking the court to make.

Note: If you are seeking a direction that this matter be heard at an Administrative Court venue other than that at which this claim was issued, you should complete, lodge and serve on all other parties form **N464** with this acknowledgment of service.

☐ Set out below

☐ attached

Section E

Response to the claimant's contention that the claim is an Aarhus claim

E1. Do you deny that the claim is an Aarhus Convention claim?

☐ Yes. Set out your grounds for denial in the box below.

☑ No

E2. Do you wish to vary the costs limits under CPR 45.43(2)?

☐ Yes. State the reason why you want to vary the limits on costs recoverable from a party.

☑ No

Section F

Statement of truth

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

☐ **I believe** that the facts stated in this form are true. I confirm that all relevant facts have been disclosed in this application.

☑ **The defendant** believes that the facts stated in this form are true. **I am authorised** by the defendant to sign this statement.

☐ **The interested party** believes the facts stated in this form are true. **I am authorised** by the interested party to sign this statement.

Signature

☐ Defendant

☐ Litigation friend

☑ Defendant's legal representative (as defined by CPR 2.3(1))

Date

Day	Month	Year
03	08	2021

Full name

STEPHEN REID

Name of defendant's legal representative's firm

3C LEGAL PRACTICE

If signing on behalf of firm or company give position or office held

SENIOR PLANNING LAWYER

Give an address to which notices about this case can be sent to you

Name

STEPHEN REID

Address

Building and street

SOUTH CAMBRIDGESHIRE HALL

Second line of address

CAMBOURNE BUSINESS PARK

Town or city

CAMBOURNE

County (optional)

CAMBRIDGE

Postcode

C B 2 3 6 E A

If applicable

Phone number

07817 730893

DX number

729500 CAMBRIDGE 15

Email

stephen.reid@3csharedservices.org

If you have instructed counsel, please give their name address and contact details below.

Name

ASITHA RANATUNGA

Address

Building and street

CORNERSTONE BARRISTERS

Second line of address

2-3 GRAYS INN SQUARE

Town or city

LONDON

County (optional)

Postcode

W C 1 R 5 J H

If applicable

Phone number

020 7421 1806

DX number

Your reference

Email

asitha.ranatunga@cornerstonebarristers.com

Completed forms, together with a copy, should be lodged with the Administrative Court Office (court address, listed below), at which this claim was issued within 21 days of service of the claim upon you, and further copies should be served on the Claimant(s), any other Defendant(s) and any interested parties within 7 days of lodgement with the Court.

Administrative Court addresses

Administrative Court in London

Administrative Court Office, Room C315, Royal Courts of Justice, Strand, London, WC2A 2LL.

Administrative Court in Birmingham

Administrative Court Office, Birmingham Civil Justice Centre, Priory Courts, 33 Bull Street, Birmingham B4 6DS.

Administrative Court in Wales

Administrative Court Office, Cardiff Civil Justice Centre, 2 Park Street, Cardiff, CF10 1ET.

Administrative Court in Leeds

Administrative Court Office, Leeds Combined Court Centre, 1 Oxford Row, Leeds, LS1 3BG.

Administrative Court in Manchester

Administrative Court Office, Manchester Civil Justice Centre, 1 Bridge Street West, Manchester, M3 3FX.

IN THE HIGH COURT OF JUSTICE **Claim No. CO/2372/2021**

ADMINISTRATIVE COURT (PLANNING)

BETWEEN: -

THE QUEEN

(FEWS LANE CONSORTIUM LIMITED) **Claimant**

And

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL **Defendant**

SUMMARY GROUNDS FOR RESISTING THE CLAIM

[References in square brackets are to the Claim Bundle]

1 The Claimant seeks to challenge the Council's decision as Local Planning Authority to grant planning permission (S/20/02453/S73) under s.73 of the Town and Country Planning Act 1990 (as amended), for the variation of Condition 7 (Traffic Management Plan) of planning permission S/0277/19/FL at land at the rear of 'The Retreat', Fews Lane, Longstanton, Cambs CB24 3DP.

2 The Grounds are unarguable and totally without merit. Permission for the claim should be refused under CPR 54.4, and the Court is invited to record that the claim is totally without merit under CPR 3.3(7).

Relevant Background

3 On 9 May 2019, the Council granted planning permission for the demolition of an existing bungalow and construction of two dwellings including car parking and landscaping at the Retreat, Fews Lane, Long Stanton, Cambridge, CB24 3DP (S/0277/19/FL) [120-127].

4 Condition 7 of the 2019 consent was a pre-commencement condition requiring the submission of a traffic management plan, to be agreed with the Council. It identified principal areas of concern which primarily related to construction related traffic [121].

5 There was no challenge to the grant of the 2019 consent and the 3-year commencement period for that consent has not expired (Condition 1) [120]. The 2019 consent represents a highly material fallback position.

6 By an application dated 21 May 2020, the applicant sought a variation of Condition 7 under s.73 of the TCPA 1990 (as amended) [129-131]. In essence, the variation application sought to amend the wording of the condition from a pre-commencement condition to a condition requiring compliance with an approved Traffic Management Plan (prepared by SLR Consulting and dated December 2019) [132-147]. That is, it sought both the variation of the condition and approval of the Traffic Management Plan.

7 The focus of the Traffic Management Plan, consistent with the identified areas of concern, was on construction works associated with the development [135].

8 The s.73 application was considered at 3 Planning Committee meetings.

9 In January 2021, the Committee resolved to approve the application subject to [161, para. 1]:

- The revision of one paragraph of the Traffic Management Plan, so as to prevent delivery vehicles from parking on any street within the village of Longstanton;
- The addition of an informative urging the applicant to establish a liaison mechanism between residents, the site manager, and Longstanton Parish Council, to monitor compliance with the Traffic Management Plan and to resolve any disputes.
- The Conditions and Informatives set out in the Officer Report which had recommended approval.

10 The Officer Report for the January Committee recorded that the Claimant had made representations in relation to the application on 7 occasions: 10 July 2020, 27 July 2020, 20 August 2020, 23 August 2020, 3 September 2020, 8 September 2020, and 28 September 2020. These were summarised in the Officer Report [172, para. 24].

11 Not one the 7 representations made by the Claimant raised any of the points now made in the first 3 Grounds of this Claim, and only generalised assertions were made in respect of Ground 4.

12 Following the January 2021 resolution, the consent was not issued. That was because, although the application had been advertised as affecting a PROW, officers mistakenly gave advice at the meeting that such advertisement was not required. In addition, a late representation had also been received by a resident (not the Claimant) the evening before the January meeting which had not been passed to officers nor reported to Members [161, para. 2].

13 In April 2021, the application was reported back to Committee with updates responding to the above matters. In addition, a further update was required as a result of a late representation from the Claimant dated 1 April 2021 raising non-compliance with Policy NH/6 (Green Infrastructure). This was responded to in the further update, with no change to the recommendation of approval [166].

14 This 8th representation also did not touch upon any of the Grounds now raised in the Statement of Facts and Grounds.

15 At the April 2021 Committee, the Claimant raised yet further concerns that its representations had not been fully assessed within the Officer Reports. In response, the Committee agreed to defer consideration of the application so that the representations could be examined and addressed, as necessary [161, para. 3].

16 A full update was provided for the May 2021 Committee meeting [161-165]. This outlined the events above.

17 The Update also summarised the Claimant's representations of 1 March 2021 and 14 March 2021 as follows [161, para. 4]:

- Objects on highway safety grounds – no safe access for the site and adverse impacts upon the safety of users of the public highway
- The Local Highway Authority originally objected but changed its mind as the 'local highway authority has unlawfully taken into consideration an immaterial consideration, namely, the identity of the owner of land within the application site and the identify [sic] of owner of land outside the application site that is not owned by the applicant.'
- Recommends conditions regarding the lane to be widened to 5m, insertion of 2m by 2m pedestrian visibility splays and the maintenance of such splays
- The development to erect 5 houses has been divided amongst multiple planning applications for 1 or 2 houses at a time. The LPA should not consider these developments in isolation.

18 The first three points go to the heart of the Claimant's concerns, that the development will give rise to highway safety issues [see SFG 37, 40, and 57 at paras. 48, 57, and 71]. That view was not shared or supported by the statutory consultee, the Local Highway Authority, or officers.

19 The May 2021 Update directly responded to those representations in full, quoting a detailed passage from the original Officer Report which resulted in the 2019 consent, in which the planning merits of the suggested highway improvements to Fews Lane, the extent of the red line, and visibility splays were all considered [162-165, paras. 6-14].

20 On these points, the Update concluded that [164, paras. 8-10, in summary]:

- Highway safety issues relating to Fews Lane have been robustly considered at appeal level.
- Officers have considered the cumulative impact of the total amount of properties along Fews Lane.
- The conditions proposed by the Claimant (on upgrading Fews Lane and visibility splays) were not imposed on the 2019 consent.
- Nor have the Highway Authority requested visibility splay conditions on the current s.73 application.

- Neither members nor officers are bound by the advice of the Highway Authority.
- The ownership of Fews Lane is immaterial to the necessity of upgrades to it.
- In Officers' view, it is not necessary to apply additional conditions as part of the s.73 application to upgrade Fews Lane or maintain pedestrian visibility splays.
- The splays required are contained within the adopted highway.
- Material circumstances have not altered to suggest that such conditions are now necessary.
- Since the 2019 consent did not impose such conditions, to impose them now would not be reasonable for a s.73 application which seeks to amend the wording of the Traffic Management Plan, particularly given that the 2019 consent could be implemented without complying with those conditions.

21 The Update also recorded that, since the April Committee, the Claimant had sent 2 pre-action protocol letters to the Council, one relating to this application, and one relating to an application for the adjacent site to the rear [161, para. 5][1]. These argued that the Council had no jurisdiction to entertain this application because (in this case) the red line area on the location plan failed to include all the land necessary to carry out the proposed development contrary to Article 7(l) of the DMPO 2015, and specifically failed to include the land required for visibility splays.

22 The Update responded to these points by noting that, pursuant to Article 7(l) of the 2015 Order, no location plan is required for a s.73 application. The 2019 Officer Report had considered the representations concerning the adequacy of the access to the plot, the proposed improvements including the widening of the Fews Lane access, visibility splays, and the extent of the red line [see 110-111]. The grant of consent in 2019 had not been challenged. The Update concluded that the Council did not agree that it had no lawful authority to entertain the s.73 application pursuant to s.327A of the 1990 Act and Article 7 of the 2015 Order [165, para. 12]. An Officer Presentation was produced for the May 2021 Committee which also responded to the points raised in the pre-action letter, noting that the Council had taken external legal advice from Counsel on the points. A copy of a Counsel's advice (on the

[1] In fact, the Claimant had sent 3 PAP letters to the Council relating to this application dated 28 September 2020, 30 April 2021, and 21 May 2021 **(see Exhibits 3, 5 and 7 attached)** - all of which were responded to **(see Exhibits 4,6 and 8)–** before the PAP letter for this claim at [192-196].

same point, albeit relating to a different site) and the Council's cover email were contained in the background papers accompanying the Officer Report.

23 Finally, the Update recorded that, notwithstanding that neither the 2019 consent nor the s.73 application included a site location plan which extended to the adopted highway and included visibility splays, 1.5m pedestrian visibility splays are available within the adopted highway at the junction of Fews Lane and the High Street, and the Highway Authority has a duty to maintain the highway, which includes the verge in this case [165, para. 13].

24 The Updates from April 2021 and the original January 2021 Officer Report were enclosed with the May 2021 Update. The recommendation to approve as per the January 2021 resolution remained the same [165, para. 16].

25 Copies of the correspondence relating to this application between the Claimant and Council, with an index running to 109 pages (redacted due to some correspondence being marked "without prejudice"), were appended to the Officer Report. These appendices have not been included in the Claim bundle.

26 On any view, the Claimant was heavily involved in the process leading to the decision to grant approval for the s.73 application on 27 May 2021, making many representations covering a wide range of legal and factual issues, which were all considered and put before the Committee.

27 Despite this, following the Decision Notice of 27 May 2021, the Claimant's pre-action letter dated 21 June 2021 stated 6 Grounds of proposed challenge [192-196], with 2 more raised by email dated 30 June 2021. Four of the Grounds (2, 3, 4, and 6) had not been raised before, whilst Ground 5 continued to be phrased in a very general fashion. No basis or explanation as to how the Grounds were made out, or how they rendered the Council's decision unlawful, was contained in the PAP letter, in breach of the Pre-action protocol for judicial review (Annex A, Section 7 Template), and despite the Claimant's considerable familiarity with judicial review procedures.

28 By letter dated 5 July 2021, the Council provided a full response to the PAP letter, making the point that those Grounds had not been raised before, and noting the non-compliance with

the pre-action protocol. The Claimant's PAP letter is included in the Claim bundle [192-196]; the Council's response is not included in the Claim Bundle **(but see Exhibit 11 attached)**[2].

29 As to the Grounds now contained in the Statement of Facts and Grounds, Ground 1 on Policy H/16, and Ground 2 on the 2013 permission, were raised for the first time in the PAP letter and responded to in the Council's PAP response. Ground 3 on a legitimate expectation arising from the Council's Statement of Community Involvement has never been raised in this form before, though legitimate expectation was raised in vague terms for the first time by email dated 30 June 2021, after the PAP letter. As to Ground 4, it is particularised now for the first time.

30 There is no reason – let alone a good reason – provided by the Claimant as to why the above Grounds could not have been raised before, so that they could have been considered by Officers and the Council with the many other representations made by the Claimant.

31 The Planning Court has specifically deprecated such an approach, whereby issues are raised for the first time after the grant of planning permission - by a party who was fully engaged in the process up to determination - where it is claimed in subsequent judicial review proceedings that such matters should have been taken into account (*R (Luton BC) v Central Bedfordshire Council et al.* [2014] EWHC 4325 (Admin) at §107 per Holgate J). In this case, none of the Grounds have any substance. The way in which they have been raised, both inexplicably late and apparently as part of a campaign to frustrate the proper planning process relating to a development site which is adjacent to the Claimant's controlling Director (Mr. Daniel Fulton), should be reflected in any award of costs, if permission is refused.

Approach to Officer Reports

32 It is well recognised that an officer report should be read using a sensible approach and with common sense applying the principles summarised in *R (Mansell) v Tonbridge & Malling BC* [2019] PTSR 1452 at §42 per Lindblom LJ.

[2] The emails of 6 July 2021 **(which are also attached see Exhibits 12 and 14)** reveal how the Claimant has sought to mischaracterise the Council's responses.

33 As to the content of such reports:

> ' .. *[T]he courts should not impose too high a standard upon such reports, for otherwise their whole purpose will be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves.*'
>
> (*R (Morge) v Hampshire CC* [2011] UKSC 2 at §36 per Baroness Hale).

> '*The court should focus on the substance of the report .. to see whether it has sufficiently drawn councillors' attention to the proper approach required by the law and material considerations, rather than to insist upon an elaborate citation of underlying background materials. Otherwise, there will be a danger that officers will draft reports with excessive defensiveness, lengthening them and over-burdening them with quotation of materials, which may have a tendency to undermine the willingness and ability of busy council members to read and digest them effectively.*'
>
> (*R (Maxwell) v Wiltshire Council* [2011] EWHC 1840 (Admin) at §43, per Sales J)

Ground 1: failure to consider Policy H/16 of the Development Plan

34 The lack of merit in this Ground is revealed by the fact that it was raised for the first time in the PAP letter. The Claimant made at least 8 representations during the consideration of the application. One - the late representation for the April 2021 meeting - argued that the Council had failed to consider a different policy of the Development Plan, Policy NH/6. Not one of those representations argued that the Council had failed to consider Policy H/16, which the Claimant now claims is '*the key material policy*' of the Development Plan relating to this application [36, para. 45].

35 The Officer Report for this application does not expressly reference or assess policy H/16. That is because it was not a principal consideration in assessing the merits of this application. The s.73 application was for the variation of a traffic management plan condition associated with the 2019 consent. The approved plans are the same between the 2019 consent and this s.73 application. No change to the design, scale or footprint of the scheme or the character of the

area was proposed as was confirmed in the Update for the May 2021 Committee [164, para 11, emphasis added]:

'It is to be noted that the current S73 application only seeks to amend the wording of the Traffic Management Plan condition and does not seek to change the design or layout of the approved dwellings. ***There also has been no material change in the surrounding context or planning policy to warrant forming an alternative view.'***

The statement in bold has not been challenged or disputed by the Claimant.

36 The Officer Report for the January 2021 Meeting went on to explain that the principle of development had been established [169, para. 33]:

'The principle of development of the dwellings on the site has already been established through the granting of the original application (S/0277/19/FL). Officers are satisfied that there has been no material change in policy or the surrounding context that requires a re-assessment of any other conditions attached to the approved development. The assessment for this application focuses on the proposed variation of condition 7, including consideration of the reasons for the condition and the acceptability of the proposed changes to the condition that are being sought. This centres upon the assessment of the acceptability of the submitted Traffic Management Plan having regard to highway safety.'

37 Not only was there nothing unlawful in this approach, which recognised that the 2019 consent had established the principle of development, but it was an eminently practical and proportionate approach in the circumstances. It demonstrated that thought had been given to a change of circumstances since the decision in 2019, but that that had been ruled out. The 2019 consent had not been challenged and remained extant. There was nothing to prevent its implementation as a fall back.

38 In any event, the basis on which Policy H/16 is argued by the Claimant to be relevant reveals the lack of substance in this Ground. Policy H/16 refers to a series of development principles concerning the development of residential gardens. Of those principles, the one that the Claimant argues the Council did not consider was that there should be no significant harm to the local area, taking account of the criterion of the ability to create a safe vehicular access [37, para. 48ff.].

39 Yet that was precisely the issue addressed and considered carefully both in the May 2021 Update to the Officer Report [162-165] and in the main January 2021 Officer Report under the heading '*Highway Safety – Traffic Management Plan*' [175-178].

40 There is nothing whatsoever which turns on the "threshold" set in Policy H/16, that there should be '*no significant harm*' to the local area, contrary to the assertion in para. 52 of the Grounds [38]. That is to elevate form over substance. The analysis provided in the Officer Report took account of the cumulative impact of development and followed the advice of the Highways Authority, that there would be no harm to highway safety with the Traffic Management Plan in place.

41 As a result, there was in any event no failure to deal with the substance of the matter now complained of.

42 Lastly, for the above reasons, even if – which is denied – there was a requirement to consider Policy H/16 for this application, it is inconceivable that the application of Policy H/16 would have made any difference whatsoever to the outcome and permission should be refused (s.31(3C-3D) of the Senior Courts Act 1981). Section 31 of the 1981 Act was amended to require the Court to consider, even at the leave stage, whether the conduct complained of would have been substantially different, precisely to prevent unmeritorious Grounds such as these clogging up the Court system.

43 In the circumstances of this application, it was not necessary to examine the merits of the s.73 application against policy H/16 given the principle of development established by the 2019 consent and the details of the S73 application. In any event, it is inconceivable it would have made any difference to the outcome. This point was never raised by the Claimant, or any other third party, until after the grant of the s.73 permission.

Ground 2: failure to consider the 2013 decision for additional dwellings in Fews Lane

44 As with Ground 1, this Ground is devoid of substance. The Claimant seeks to rely on a 2013 decision whilst altogether ignoring subsequent events.

45 First, the 2013 decision was superseded by a more recent planning permission, namely the 2018 appeal decision. As referred to above, the Council set out in detail its reasoning for the conclusion that highway safety would not be compromised by reference to the Officer Report for the 2019 consent (S/0277/19/FL), with full extracts quoted at paragraph 7 of the May Update [162-164]. This included consideration of appeal decisions by Inspectors of 1989 and 2018, either side of the Council's decision of 2013. The conclusion of the 2018 Inspector was specifically referred to, namely that although Fews Lane did not meet modern highway standards in terms of both its geometry and construction, that development would provide safe and appropriate access [164].

46 Secondly, the Officer Report fairly and properly relied upon the Highway Authority's view for this application, to the effect that there was no need for widening of the access or visibility splays [149]. The issue had been properly scrutinised by the Highway Authority as reflected in the Officer Report [177, para. 38, emphasis added]:

'*.. At the access point into Fews Lane, intervisibility between vehicles or pedestrians on the High Street and Fews Lane, noting the existing footway width along High Street and the position of the hedges and boundaries, has been judged to be appropriate. The Local Highway Authority officers are familiar with this site and have made it clear that they now find the TMP to be acceptable …*'

And later [177, para. 40]

'*.. The assessment of the proposals by County Highway officers reported above is also considered to be satisfactory – noting that the application of County Council policies are matters of judgment based upon the specific site circumstances. Officers have no reason to disagree with the conclusions of the County Highway officers in this matter, including on the matter of the need for an explicit visibility splay to be shown for pedestrians at the site entrance*.'

47 Thirdly, the Highway Authority explained its position on visibility splays and widening to the Claimant in correspondence relating to an earlier application (S/2439/18/FL) on an adjacent site. (see Exhibit 2 attached) It was stated that pedestrian visibility splays of 1.5m x 1.5m could be achieved when exiting Fews Lane, and that the access could not be widened to 5m given it was only approximately 2m in width and due to ownership issues [93, paras. 14 / 15 and 21]. This was in response to those specific points being raised by the Claimant in a letter dated 3 December 2018 **(see Exhibit 1 attached)**.

48 Fourthly, on visibility splays, the May Update to the Officer report recorded that 1.5 x 1.5m pedestrian visibility splays are available within the adopted highway at the junction of Fews Land with the High Street, and that the Highway Authority has a duty to maintain the highway including the verge [165, para. 13].

49 Fifthly, as a matter of fact, the site for the 2013 permission (S/2561/12/OL) is not the same site as that relating to the site which is the subject of this challenge 20/02453/S73 (i.e. S/0277/19/FL). The 2013 permission was therefore not directly relevant to the decision before the Council. The 2013 permission was referred to in the planning history section of the Officer Report [169, para. 13].

50 Sixthly, and in any event, Members of the Planning Committee were presented with photographs of Fews Lane and of its junction onto Longstanton High Street as part of the presentation made by Officers for the May 2021 meeting. Members of the Planning Committee therefore had all the necessary and relevant information before them to make an informed decision regarding the highway safety implications of their decision, including their powers to impose additional conditions if they thought it necessary to do so.

51 The above context amply demonstrates that, in the light of the 2018 appeal decision, the position of the Highway Authority on this application, and judgments made by the Highway Authority and officers in the Officer Report as to the availability of visibility splays and the possibility of widening, the 2013 permission was simply part of the distant planning history which had been overtaken by subsequent events. In the circumstances, it was not so obviously material as to require direct consideration (*R (Samuel Smith Old Brewery (Tadcaster) et al) v North Yorkshire CC* [2020] PTSR 221 at §32 per Lord Carnwath). Further or alternatively, it cannot sensibly be contended that the 2013 permission could possibly have made any material difference to the assessment of the highways implications and the outcome of the application, and permission should be refused (s.31(3C-3D) of the Senior Courts Act 1981).

Ground 3: Breach of legitimate expectation

52 This Ground fails on the facts and adds nothing. There is in fact no relevant legitimate expectation and the attempt to engineer one is misconceived.

53 The legitimate expectation is alleged to arise from the combination of an unexceptional statement in the Statement of Community Involvement, that representations would be taken into account, together with a table attached to an email from the Claimant dated 20 April 2021, which was headed '*Planning History*' [159]. The table contained bare assertions as to whether previous permissions had been implemented, whether they were valid, and whether they provided a fall back. The email to which the table was attached gave no further indication as to the reasoning behind those assertions, stating that the attached table was shared '*summarising the planning history of the site*' [158].

54 The table was not put forward as a formal representation to the s.73 application, but as a reference document for a meeting. The Claimant sent the email and table to certain officers for the purposes of a meeting arranged by the Director of Planning Stephen Kelly, together with Toby Williams and the Council's Solicitor Stephen Reid, to seek to understand the Claimant's concerns (the Subject of the email was '*For today's meeting*') [158]. It is plain from a fair reading of the Claimant's email that, at that stage, the Claimant's concern was the Highways Authority's stance [158].

55 The Claimant mischaracterises this table, attempting to elevate it as a chronological list '*which raised a number of material considerations relating to the planning history*' [42, para. 70].

56 Even if – which is denied - it was a representation, there is nothing in the Council's Statement of Community Involvement which would require the Council to deal in detail with all such representations made. It is trite law that it is a matter for officers' judgment as to the detail to be presented in officer reports.

57 Both in terms of the context in which it was raised, and its content, the table could not give rise to a legitimate consideration that matters of validity and fallback would be expressly considered as part of the planning application.

58 In any event, insofar as matters of validity were raised, they were dealt with at length, see paras. 21-22 above. There is nothing in the table to suggest any other validity concerns.

59 The January Officer Report provided a list of the relevant planning history for the application site and for the adjacent site [169, paras. 13-14]. It was not necessary for the officer

assessment to provide a detailed analysis of the planning history of all the planning proposals for Fews Lane, nor a detailed analysis of every application and associated reasoning in respect of highway safety matters (*Maxwell, Morge*).

60 Insofar as the Officer Report did rely on a fall-back position relating to the 2019 consent, that was a planning judgment open to officers (*Mansell*, §27). It was far from irrational for officers to consider that there was a real prospect of the 2019 consent being implemented. They noted that the expiry date of the permission was 9 May 2022 [164, para. 10]. The 2019 consent remains a legitimate fall-back position.

61 As with Grounds 1 and 2, the gravamen of this Ground is the contention that a more detailed consideration of the planning history might have led to a different decision on highway safety grounds [43, para. 71]. On any fair reading of the Officer Report, including its updates, the highway safety aspects of the proposal were comprehensively covered. The relevant planning history was set out and considered as part of that analysis. Even if, which is denied, the planning history had to be picked over in minute detail, it is highly likely that the outcome would have been the same and permission should be refused under s.31(3C-3D) of the Senior Courts Act 1981.

Ground 4: misdirection as to proper approach to applications under s. 73 of the Town and Country Planning Act 1990

62 This Ground fails on the facts. The Ground is based on an over-zealous reading of the Officer Report focussing in on one part of it, without reading the Report fairly and as a whole (*Morge*).

63 The approach to the s.73 application was perfectly proper. The officer presentation **(see Exhibit 9 attached)** which was read to the Planning Committee in May 2021 specifically advised members that:

'The effect of granting a S73 application is that a new planning permission is given (which is con[s]trained by the original time limit for implementation). Otherwise, the question of what conditions, if any, are necessary to make the proposed development acceptable in planning terms is for the members of planning committee. Members of the committee are free to attach new conditions not previously attached if those new conditions are necessary to make the proposed development acceptable in planning terms and meet the other six tests of planning conditions and are legal in all other respects.

Officers can advise members that, as a fresh permission will be issued, since S/0277/19/FL was approved, there has been no material change of policy or other circumstances which might require a re-assessment of other conditions or, indeed a re-assessment of the development as a whole. Whilst the officer's report covers re-assessment of conditions, officer's should add that we are satisfied that no wider reconsideration of the principle of development is justified.'

64 There was nothing improper in officers quoting the PPG on s.73 applications, which reflects the focus of such applications [175, para. 32]. Indeed, para. 031 of the PPG reflects the language of s.73(2) of the 1990 Act. In any event, the Officer Report for the January 2021 meeting followed a proper approach, noting in the very next paragraph that the principle of development had already been established through the grant of the 2019 consent and that officers were satisfied that there had been no material change in policy or the surrounding context that required re-assessment of any other conditions attached to the approved development [175, para. 33]. Consideration was given in the Officer Report to whether there had been a material change of circumstances since the 2019 consent. This demonstrates that officers and the Council did not limit their consideration only to the condition which was the subject of the application, but considered the application from a wider perspective and found no reason to consider matters beyond the particular condition in question.

65 Having followed the proper approach in the Planning Assessment section of the Report [175-178], the Officer Report concluded by applying the planning balance and recommending that planning permission be granted, '*subject to conditions (with the revised wording to condition 7) imposed on planning permission S/0277/19/FL*' [178, para. 45].

66 The approach was therefore not solely focussed on the Condition sought to be varied by the application, but properly considered the principle of development against the backdrop of the 2019 consent and the absence of any material change in policy since then. This was a proper approach and there was no misdirection.

67 *Stefanou* was a very different case on its facts involving an expanded development from that which had previously been permitted. The Court was not required to – and did not - grapple with the precise terms of s.73(2) and how they should be applied in different situations. In that case, a new storey was proposed, and the flaw was the failure to consider the impact of the whole [466 §1, 484 §88]. Furthermore, when considering that impact, Gilbart J clearly did not rule out consideration of and weight to be given to the fall back position [484 §91].

68 Since issuing this claim, by emails dated 28 July 2021 and 1 August 2021 **(see Exhibits 16 and 17 attached)**, the Claimant has sought to require the Council to disclose other decisions in which the Council has interpreted s.73 in the same manner as in this case. The request is misconceived. For the above reasons, the Council has not unlawfully approached the s.73 application under challenge, when the Officer Report is read as a whole (and as spelled out in the officer presentation). There is therefore no justification whatsoever for the Council to be required to disclose other s.73 decisions to show its approach there, relating to decisions which are not under challenge.

Other Matters

69 The Claimant asserts that the Consortium is a community action group and has five shareholders [23, §2]. No details are provided of the shareholders.

70 No details are provided as to how the Consortium has taken its decisions concerning this litigation. In particular, no minutes of meetings, or resolutions, have been provided which demonstrate how collective decisions as to this claim have been taken and to what extent and in what way the Consortium's shareholders have been kept informed of such decisions.

71 The above information is relevant to the Council's consideration of the Claimant's Statement of Financial Support [48], and whether it is effectively acting through one controlling mind such that the corporate veil can be pierced. Daniel Fulton is an immediate neighbour of the development site.

72 The Council accepts that the claim is an Aarhus Convention claim and that the costs capping provisions do apply on the information provided at the current time. However, for the above reasons, the Council reserves its right under CPR 45.44(6) to apply at a later stage to vary the Claimant's costs cap of £10 000 (CPR 45.43(2)(b)). The Council requests disclosure of the following documents in order to ascertain whether the Claimant's decision making is undertaken following a proper and transparent process, and to discover whether its actions are really those of an individual:

(1) Details of all meetings, minutes, and resolutions relating to this claim.

(2) Details proving that the shareholders exist, and evidence demonstrating how they have been kept informed of any decisions relating to this claim.

(3) Clear evidence that the Consortium truly acts as a community action group, and not in effect through one individual, namely Daniel Fulton.

73 If, following disclosure and consideration of the above documents, it transpires that the Claimant is in effect the operation of one individual, an application under CPR 45.44(6)(b) may be made.

74 For the above reasons, it is respectfully submitted that permission should be refused, and the Court is invited to record that the Grounds are totally without merit (CPR 3.3(7)). The Council seeks the costs of its Acknowledgment of Service in the sum of £8,852 .00 (plus VAT where applicable 0(detailed costs schedule to follow within the next 7 days)

ASITHA RANATUNGA

3 August 2021

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

I am duly authorised by the Defendant to give this Statement of Truth.

SIGNED: 

POSITION: Senior Planning Lawyer

DATED: 4 August 2021

IN THE HIGH COURT OF JUSTICE **Claim No.CO/2372/2021**

QUEEN'S BENCH DIVISION
PLANNING COURT IN THE ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN
(on the application of FEWS LANE CONSORTIUM LTD) Claimant

and

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL Defendant

and

LANDBROOK HOMES LTD Interested Party

Exhibit 1
Letter dated 03.12.2018
Daniel Fulton to Cambridgeshire County Council

The Elms
Fews Lane
Longstanton
Cambridge
CB24 3DP

3 December 2018

Ms Victoria Keppey
South and City Highways
Cambridgeshire County Council
Station Road
Whittlesford
Cambridge
CB22 4NL

Dear Ms Keppey

Re: SCDC Planning Application S/2439/18/FL

Thank you for the information you provided recently concerning the statutory consultation for the planning application referenced above.

(1) As a statutory consultee, the County Council has a legal obligation to issue a substantive response in regards to the consultation pursuant to article 22 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (S.I. 2015/595).

(2) As defined by the Government's Planning Practice Guidance, a statutory consultee's substantive response "should include reasons for the consultee's views so that where these views have informed a subsequent decision made by a local planning authority the decision is transparent".[1]

(3) At present, the only substantive response received by the South Cambridgeshire District Council in regards to the above referenced application is dated 17 July 2018 and requests that the application be refused.

(4) I am aware that other informal communications have been ongoing between the County Council and at least one officer employed by the South Cambridgeshire District Council ("SCDC"). Although these informal communications may have discussed changes in regards to the consultation response, no updated substantive response has been received by the District Council in regards to the statutory consultation.

(5) It is my understanding that the role the Local Highway Authority in the statutory consultation process is to evaluate the application and make recommendations to ensure satisfactory access arrangements are included within the proposed development and to ensure that the proposed development does not adversely affect the safety of highway users.

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[1] Ministry of Housing, Communities & Local Government. *Planning practice guidance: Consultation and pre-decision matters.* Paragraph: 015. Reference ID: 15-015-20140306. Revision date: 06 03 2014. Published on GOV.UK [https://www.gov.uk/guidance/consultation-and-pre-decision-matters#Statutory-consultees]. Accessed 1 Dec 2018.

(6) It is also my understanding that the Local Highway Authority performs this role by evaluating each application in light of the national highways policies that apply to the particular application.

(7) In regards to application S/2439/18/FL, the principal relevant national policies will be included in the *Manual for Streets* (“MfS”), *Manual for Streets 2* (“MfS2”), and the National Planning Policy Framework (“NPPF”).

(8) There are a number of specific highway safety concerns that the County Council has a duty to address. These issues are summarised in paragraphs 9 through 19.

(9) Fews Lane is both a private vehicular track and well-used public footpath. The width of the carriageway at present is insufficient for a vehicle and a pedestrian travelling in opposite directions to pass without the pedestrian or the vehicle departing from the carriageway and stepping or driving onto adjoining private property.

(10) Fews Lane was originally intended to serve 3 dwellings. Approval of this application would double the number of dwellings served to 6. Each dwelling has garage or parking space for 3 vehicles, and the proposed dwelling adds another 2 parking spaces. In additional to the total daily vehicular movements of the residents, approximately an equal number of vehicular movements along Fews Lane occur each day due to service vehicles, for example for Royal Mail or parcel delivery services.

(11) The width of Fews Lane is insufficient to allow two vehicles travelling in opposite directions to pass each other along the length of Fews Lane without one vehicle either trespassing by driving onto private property or by one vehicle reversing out of Fews Lane to allow the other vehicle to proceed.

(12) During heavy rain, water and sediment is washed from Fews Lane into the public highway.

(13) The surface of Fews Lane is composed of dirt and gravel, and these unbound materials tend to spread into the public highway, which will only be exacerbated by increased vehicular traffic.

(14) When vehicles are exiting Fews Lane onto High Street, there is ZERO visibility of pedestrians walking along the footway to the south of the junction.

(15) In order to see any pedestrians on the footway, a vehicle must pull forward so that the front of the vehicle not only enters the footway, but it must entirely cross the footway and enter the carriageway. It is not until this point where the front of the vehicle has already entered the public highway that there is sufficient visibility for a driver of oncoming vehicular traffic or of pedestrians on the footway.

(16) The bus stop used by the schoolchildren from the northern half of the village is located only a few meters away from the junction of Fews Lane and High Street. Not only are children shorter and more difficult for drivers to see, but they also have a natural tendency to run along the pavement. The ZERO visibility factor combined with the proximity of the school bus stop is a recipe for disaster. I will retain this letter together with proof of delivery to prove that the County Council has been advised of this serious and dangerous existing defect.

(17) The spatial layout and width of the proposed vehicular access fails to comply with section 6.7.2 of the *Manual for Streets*, which sets the minimum vehicular access requirements for emergency vehicles, including fire appliances. Specifically, there is to be sufficient emergency vehicular access for a fire alliance to reach every point within 45 meters of a dwelling. In cul-de-sacs, this requires sufficient turning radii at any turns and turning heads sufficient for fire department vehicles at the end of a cul-de-sac or where a tight turning radius would require a fire appliance to turn around.

(18) With no sufficient turning head provided, the closest vehicular access to the site of the proposed development is located on High Street at the intersection with Fews Lane. This is a distance of approximately 140 meters by foot from the further point of the dwelling, far in excess of the 45 meters stated in the Manual of Streets and other regulatory documents.

(19) The Cambridgeshire Fire and Rescue Service has confirmed that the application does not meet their minimum requirements for vehicular access. Specifically, the minimum carriageway width between kerbs for the service's fire appliances is 3.7 meters. The vehicular access space available at the application site is limited to 3.5 meters, and this is restricted on one side by a fence erected directly over the kerb and by private property including a brick chimney and house on the other side.

(20) In light of the issues above, the County Council has a duty and obligation to request that the application in its present form be refused.

(21) The County Council should also request that the following conditions be attached to any permission granted despite the Local Highway Authority's request for refusal.

1. That the first 5 meters of Fews Lane should be constructed of a bound material so as not to adversely affect the public highway.

2. That the width of Fews Lane be increased to a minimum width of at least 5 meters for the 5 meters measured from the back of the footway along High Street. This would allow two vehicles travelling in opposite directions to pass each other without either vehicle having to reverse, which would represent an unacceptable danger to other highway users.

3. That pedestrian visibility splays of at least 2.0 x 2.0 meters shall be constructed at the intersection of High Street and Fews Lane.

4. That a pedestrian visibility splay of at least 2.0 x 2.0 meters shall be constructed at the junction of the parking and turning area for the proposed development with the unnamed private drive that extends to Fews Lane.

5. A condition requiring that surface water not run from the application site into the public highway.

6. Conditions necessary for the safety of highway users during the construction of the proposed development to include limits on hours of access, parking, and unobstructed emergency access.

7. Any such other conditions as are warranted by the particulars of the proposal in light of the national highway safety policy documents.

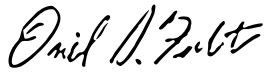
(22) I would urge the County Council to review its substantive response dated 17 July 2018 to ensure that it addresses the points raised in this letter.

(23) The actions and performance of the County Council will be subject to legal scrutiny to ensure that the County Council has adequately fulfilled its legal duties and that the County Council's substantive response complies with all relevant provisions of public law.

(24) Lastly, I would note that the appeal decision recently issued regarding another application at this site contains many factual errors. Whilst it can be material consideration in the planning process, I would caution the County Council against intending to rely on any part of the appeal decision in the performance of its duties in regards to this new application. The South Cambridgeshire District Council has been made aware of these defects in the appeal decision and has been informed that a claim for judicial review will be brought should the rely on these known errors of fact in determining this application.

I can be reached most days at 01954 789237 or on my mobile at 07944 908340. I would be happy to speak with you or anyone from the County Council if I can provide any further information regarding this matter.

Kind regards



Daniel Fulton

copy by email to Dr Jon Finney, Cambridgeshire County Council

IN THE HIGH COURT OF JUSTICE **Claim No.CO/2372/2021**

QUEEN'S BENCH DIVISION
PLANNING COURT IN THE ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN
(on the application of FEWS LANE CONSORTIUM LTD) Claimant

and

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL Defendant

and

LANDBROOK HOMES LTD Interested Party

Exhibit 2
Letter dated 12.12.2018
Cambridgeshire County Council to Daniel Fulton

My ref:
Your ref:
Date: 12th December 2018
Contact:
Telephone: 0345 045 5212
E Mail: Victoria.keppey@cambridgeshire.gov.uk

Cambridgeshire County Council

Whittlesford Depot
Box No. ET1030
Station Road
Whittlesford
CB22 4NL

The Elms
Fews Lane
Longstanton
Cambridge
CB24 3DP

Dear Mr Fulton ,

Re: Planning Application S/2439/18/FL

Thank you for your letter of 3rd December, I have reviewed the same and have the following comments:

1,2, 3 and 4. From discussions with the Local Planning Authority the Local Highway Authority have provided a substantive response. However for clarity in this case the case officer has requested that the comments made by the Local Highway Authority via email dated 14th September 2018 will be formally submitted, prior to the determination of the application.

5. The Local Highway concurs with this statement.

6 and 7. Manual for Streets Volume I and II are guidance not policy and are written in such a manor to enable the Highway Authority to consider sites on a contextually based premises.

9. The situation that you describe in relationship to the width of the footpath and its use by motor vehicular traffic is not uncommon in a rural district such as South Cambridgeshire and there is no evidence that this conflict is significant in highway safety terms while you state that the public footpath is well used no empirical data is supplied to support this assertion.

10. According to SCDC planning website Few's Lane has a planning history dating back to 1961 and these applications include for the provision of residential dwellings which will have resulted in low level incremental increase in motor vehicular traffic over this timeframe, therefore the planning application approving two dwellings (S/1498/15/FL) including the one that you now occupy is only one in a reasonably long line of such applications. In terms of traffic generation on average each new dwelling will generate 4.5 motor vehicle movements per 12 hour period, which cannot

be considered sever as required under paragraph 109 of the NPPF to warrant a recommendation of refusal by the Local Highway Authority to the Local Planning Authority.

11. As stated previous above within the response to point 9 the situation that you describe in relationship to the width of the footpath and its use by motor vehicular traffic is not uncommon in a rural district such as South Cambridgeshire and there is no evidence that this conflict is significant in highway safety terms.

12. As Few's Lane is a public highway the water draining from Few's Lane to High Street is draining from one highway to another if the deposition of silt etc from Few's Lane is considered to be significant the Highway Authority may take any action that it deems necessary.

13. The Local Highway Authority believes that there is a slight possibility that this will occur, the Local highway Authority can request that the 2m width of the Public Right of Way be constructed in a bound material.

14, 15. The Local Highway Authority believes this statement to be incorrect and that the pedestrian visibility splays as required within Design Manual for Roads and Bridges of 1.5m x 1.5m could be achieved to the back of the footway when exiting Few's Lane.

16. All accesses are a point of conflict the existing bus stop and existing access are considered to be within the normal range of risks and hazards that a user of the highway should expect to meet and that any vehicle exiting onto the High Street should take into consideration.

17, 18 and 19 Cambridgeshire Fire and Rescue Service are statutory consultees and therefore if this consultee had concerns with regards to the access these should/would have been raised with the Local Planning Authority during the consultation period.

20. Following the lack of substantive empirical evidence and only relying on subjective information the Local Highway Authority has no reason to recommend a refusal of this application to the Local Planning Authority.

21. The Local Highway Authority can only request works within land that is within the ownership of the applicant or within the public highway.

1,2. as confirmed previously the applicant does not own the access and the public right of way is only approximately 2m in width in this location therefore the access cannot be widened to 5 metres in width, however it could be constructed in a bound material for 5m from the rear of the footway and the Local Highway Authority will seek a condition to reflect this.

3. as stated above within points 14,15 the Local Highway Authority believes that pedestrian visibility splays of 1.5m x 1.5m as per Design Manual for Roads and Bridges can be achieved at the junction of Few's Lane and the High Street.

4. As the access to the approved properties under planning application S/1498/15 shows radii kerbs it would be impractical to provide the requested pedestrian visibility splays.

5. This could be encompassed within the Local Planning Authority's normal requirement for a condition relating to surface water drainage.

6. This condition is being dealt with in the form of a traffic management plan which has been submitted as a part of application number S/2439/18, the Local Highway Authority request that the application be refused as the Traffic Management Plan is not satisfactory still stands.

7. The Local Highway Authority will request any conditions that it deems fit with regards to the submitted application as long as these comply with the community infrastructure levy requirements and this is a matter for the Local Planning Authority to review.

22. Comments made by the Local Highway Authority have been reviewed and highway comments will be formally submitted, prior to the determination of the application.

23. It is my understanding that this is true of all planning applications.

24. The Local Highway Authority only considers the application submitted before them and can confirm that no information from any previous applications has been considered.

I have forward a copy of your representation to the Local Planning Authority for their consideration.

Yours sincerely

Vikki Keppey
Development Management Engineer

IN THE HIGH COURT OF JUSTICE **Claim No.CO/2372/2021**

QUEEN'S BENCH DIVISION
PLANNING COURT IN THE ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN
(on the application of FEWS LANE CONSORTIUM LTD) Claimant

and

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL Defendant

and

LANDBROOK HOMES LTD Interested Party

Exhibit 3
Email from Daniel Fulton to Stephen Reid
dated 28.09.2020 @ 7.47am

[redacted]

[redacted]

From: Daniel Fulton <dgf@fewslane.co.uk>
Sent: 28 September 2020 07:47
To: Stephen Reid <Stephen.Reid@3csharedservices.org>
Subject: The Retreat, Fews Lane, Longstanton

Dear Mr Reid,

Please see the attached letter concerning the proposed development at The Retreat, Fews Lane, Longstanton.

Kind regards,

Daniel Fulton
Director

Fews Lane Consortium Ltd
The Elms
Fews Lane
Longstanton
Cambridge
CB24 3DP

tel. 01954 789237

Fews
Lane
Consortium
Ltd

Daniel Fulton
DIRECTOR

T: 01954 789237
E: dgf@fewslane.co.uk

The Elms
Fews Lane
Longstanton
Cambridge
CB24 3DP

28 September 2020

South Cambridgeshire District Council
FAO 3C Shared Services Legal Practice
South Cambridgeshire Hall
Cambourne Business Park
Cambourne
Cambridge CB23 6EA

Dear Sirs

Judicial review pre-action protocol: 20/02453/S73 - The Retreat, Fews Lane, Longstanton

(1) The South Cambridgeshire District Council (the "**Council**") is the prospective defendant in a claim for judicial review. A copy of this letter has been sent to the Council by first class post at the address written above.

(2) The prospective claimant is the Fews Lane Consortium Ltd (the "**Consortium**"), The Elms, Fews Lane, Longstanton, CB24 3DP. The Consortium is a community action group that represents the interests of local residents in issues of planning and development.

(3) The prospective claim concerns the Council's decision to consider planning application 20/02453/S73, which concerns development proposed at The Retreat, Fews Lane, Longstanton, Cambridge CB24 3DP.

(4) The prospective claimant considers the applicant, Landbrook Homes Ltd ("**Landbrook**") to be an interested party. A copy of this letter has been sent to Landbrook by first class post at 36a Church Street, Willingham, Cambridge CB24 5HT.

(5) The Council's consideration of planning application 20/02453/S73 is unlawful pursuant to section 327A of the Town and Country Planning Act 1990 (the "**1990 Act**") because the application for the existing planning permission to which the current application relates does not comply with the requirements of article 7 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (the "**2015 Order**").

(6) Although often referred to in common parlance as an application to "vary" or "remove" planning conditions, an application submitted under section 73 of the 1990 Act, if approved, creates a new planning permission that runs alongside the extant planning permission. (*Lambeth LBC v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33, [2019] 1 W.L.R. 4317 at [10]-[11])

(7) In considering an application submitted under section 73 of the 1990 Act, a local planning authority must consider the entire scheme being applied for in accordance with the relevant policy tests, not merely consider the applicant's proposed changes to the extant planning permission. (*R (Stefanou) v Westminster City Council* [2017] EWHC 908 (Admin) at [88]-[89])

(8) The planning permission granted in regards to application S/0277/19/FL incorporates the application form and the plans, drawings, and documents accompanying the application form into the terms of the planning permission by including a statement to that effect in the operational part of the planning permission.

(9) Section 327A of the 1990 Act provides that:

> "(1) This section applies to any application in respect of which this Act or any provision made under it imposes a requirement as to—
> (a) the form or manner in which the application must be made;
> (b) the form or content of any document or other matter which accompanies the application.
> (2) The local planning authority must not entertain such an application if it fails to comply with the requirement."

(10) Article 7 of the 2015 Order provides that (emphasis added):

> "(1) Subject to paragraphs (3) to (5), **an application for planning permission must**—
> (a) be made in writing to the local planning authority on a form published by the Secretary of State (or a form to substantially the same effect);
> (b) **include the particulars specified or referred to in the form**;
> (c) except where the application is made pursuant to section 73 (determination of applications to develop land without conditions previously attached) or section 73A(2)(c) (planning permission for development already carried out) of the 1990 Act or is an application of a kind referred to in article 20(1)(b) or (c), be accompanied, whether electronically or otherwise, by—
> (i) **a plan which identifies the land to which the application relates**;
> (ii) any other plans, drawings and information necessary to describe the development which is the subject of the application".

(11) The application form, published by the Ministry of Housing, Communities and Local Government, states that:

> "The application site must be edged clearly with a red line on the location plan. It should include all land necessary to carry out the proposed development (e.g. land required for access to the site from a public highway, visibility splays (access around a road junction or access, which should be free from obstruction), landscaping, car parking and open areas around buildings)."

(12) The Consortium intends to submit that the reason that article 7(1)(c) does not apply to applications submitted pursuant to section 73 of the 1990 Act is because it is presumed that the original application on which the existing planning permission was granted included "a plan which identifies the land to which the application relates".

(13) However, in this case, the Council granted planning permission despite the fact that the land to which the planning application relates was not correctly identified at the time the application for the existing planning permission was made.

(14) As the plans submitted with the application for the existing planning permission failed to correctly identify the land to which the application relates and no new plans that correctly identify the land to which the application relates have been submitted with this section 73 application, the requirements of article 7 of the 2015 have not been satisfied, and accordingly, the application can not be entertained by the Council pursuant to the provisions of section 327A of the 1990 Act.

Interpretation of Article 7(1) of the 2015 Order

(15) Article 7(1) of the 2015 Order provides that "an application for planning permission must— […] be accompanied […] by a plan which identifies the land to which the application relates".

(16) When the government department administering an act publishes official statements in regards to the act, those statements may be taken into account as a persuasive authority on the meanings of the act's provisions. (*Oram (Inspector of Taxes) v Johnson* [1980] 2 All E.R. 1 at 6)

(17) The application form, published by the Ministry of Housing, Communities and Local Government[1], which is the government department responsible for administering the 1990 Act, provides that:

> "The application site must be edged clearly with a red line on the location plan. It should include all land necessary to carry out the proposed development (e.g. land required for access to the site from a public highway, visibility splays (access around a road junction or access, which should be free from obstruction), landscaping, car parking and open areas around buildings)."

(18) The meaning of a provision of an act my be elucidated by reference to contemporary statements indicating how the provisions were understood at the time they were enacted, particularly in esoteric areas of law where cases rarely come before the courts and there is a long established practice. (*Isle of Anglesey County Council v Welsh Ministers* [2009] EWCA Civ 94, [2009] 3 All E.R. 1110)

(19) At the time the 2015 Order was made, the planning application form instructions published by the Ministry of Communities and Local Government provided that:

> "The application site must be edged clearly with a red line on the location plan. It should include all land necessary to carry out the proposed development (e.g. land required for access to the site from a public highway, visibility splays (access around a road junction or access, which should be free from obstruction), landscaping, car parking and open areas around buildings)."

(20) Pursuant to the principles of statutory interpretation employed by the courts in *Oram* and *Isle of Anglesey*, the statements contained in the official forms and instructions published by the Ministry of Housing, Communities and Local Government, both at the time the 2015 Order was made and subsequent to the time the 2015 Order was made, are both capable of being persuasive authorities as to the proper interpretation of the relevant provisions of article 7 of the 2015 Order.

(21) Article 7 of the 2015 Order requires that applications for planning permission include "a plan which identifies the land to which the application relates" and also that applications for planning permission must "include the particulars specified or referred to in the form". The particulars specified in the application form require that:

> "The application site must be edged clearly with a red line on the location plan. It should include all land necessary to carry out the proposed development (e.g. land required for access to the site from a public highway, visibility splays (access around a road junction or access, which should be free from obstruction), landscaping, car parking and open areas around buildings)."

(22) It is acknowledged that not every planning application will require visibility splays. For example, if an application were submitted for a city centre development where no vehicular access to the site was possible, visibility splays would obviously not be required. However, the Consortium intends to submit that where an application creates a new vehicular access or proposes the intensified use of

[1] Prior to 8 January 2018, the Ministry of Housing, Communities and Local Government was referred to as the Ministry for Communities and Local Government.

an existing vehicular access, the land necessary for visibility splays must be included within the area defined by the red line on the location plan.

(23) The requirements of article 7 of the 2015 Order are statutory requirements, and neither local planning authorities nor the Secretary of State have the power to ignore the statutory requirements in any case. Any dispute as to whether the statutory requirements have been met is a question within the jurisdiction of the courts. This question can be contrasted with the question of whether visibility splays are necessary to make a proposed development or change of use acceptable in planning terms, which is a question of judgment purely within the purview of the decision maker, subject to the usual legal tests on unreasonableness.

(24) The Council has previously obtained legal advice advancing the position that the land required to carry out a proposed development includes only the land that must undergo operational development or is subject to a change of use. No authorities have been provided in support of this position, and indeed, the Council's position is at odds with the approved principles of statutory interpretation outlined above.

(25) A visibility splay will not be maintained free of vegetation without some sort of intervention. This intervention can either take the form of regular and ongoing maintenance to remove vegetation or the installation of hardstanding such as asphalt or concrete, which would prevent the growth of vegetation.

(26) The ongoing maintenance of land necessary to remove vegetation and maintain a functional visibility splay requires a positive planning condition to be attached to any permission granted, and a positive planning conditions may only be applied to land that is within the application site or within the control of the applicant. In *Mouchell Superannuation Fund Trustees v Oxfordshire County Council* [1992] 1 P.L.R. 97 at 105, Glidewell LJ states that:

> "a condition requiring the carrying out of works may validly be imposed only if the works are to be carried out on land either within the application site or on other land 'under the control of the applicant'. Thus, a condition purporting to require the carrying out of works on land neither within the application site nor within the control of the applicant is outside the powers of the Act".

(27) If the interpretation of article 7 as advanced in the Council's legal advice were to be accepted, it would be impossible to attach positive conditions requiring the maintenance of visibility splays in cases where the land in question did not require a change of use or operational development. This interpretation of article 7 would create the very kind of mischief that article 7 and the instructions in the application form were apparently designed to prevent.

(28) In installation of paving such as asphalt or concrete to prevent the grown of visibility splays constitutes operation development under sections 55(1) and 55(2) of the 1990 Act unless <u>all</u> of the following criteria apply:

1) the work is being carried out within the boundaries of a "road",
2) the work is being carried out "by" a highway authority,
3) the work constitutes the maintenance or improvement of the "road", and
4) if the work is not exclusively for maintenance, it does not or will not "have significant adverse effects on the environment".

(29) There may be many ways to achieve functional visibility splays for any given application, for example, by a positive condition, a Grampian condition, or through a planning obligation. However, the Consortium would intend to submit that the question of how best to achieve the functional visibility splay is a matter of planning judgment for the decision maker.

(30) For a local planning authority to accept as valid and to proceed to consider a planning application that plainly fails to comply with the requirements of article 7 and the requirements stated in the application form, would in effect remove the option of the positive planning condition from the decision maker's choices. This effectively constitutes predetermination of the application, at least in regards to a positive condition for the maintenance of visibility splays, and where the issue of visibility splays goes to the root of the decision as to whether to grant planning permission, this predetermination may be sufficient for the court to decide to quash a planning permission granted in such circumstances.

(31) The failure to properly identify the land to which the application relates is also extraordinarily prejudicial to the ability of statutory consultees and members of the public to give intelligent consideration and response to planning proposals during periods of consultations.

(32) Officers of local highway authorities should be able to rely on the fact that application documents that have been validated by the local planning authority and published for consultation correctly depict the land to which the application relates by outlining that land in red on the location plan, as is required under article 7. Whilst in an ideal world, local highway authority officers might be well versed in the nuances of planning law, this is usually not the case, and both statutory consultees and members of the public rely on the validation opinion of the local planning authority to establish that the land to which the planning application relates has been correctly identified on the location plan in accordance with the relevant legal standards. A local planning authority that consults on an application with an invalid location plan not only violates section 327A of the 1990 Act, but also potentially renders the consultation on the application unlawful on grounds of procedural impropriety. (See *R v North and East Devon Health Authority ex p Coughlan* [1999] EWCA Civ 1871, [2001] Q.B. 213 at [112].)

Pre-action protocol

(33) For these reasons, the Consortium will be seeking an order to prohibit the Council from considering planning application 20/02453/OUT, unless a decision to grant planning permission is issued by the Council, in which case a quashing order will be sought. The Consortium will also seek a declaration that the Council has erred in law and an order that the Council pays the Consortium's costs in the claim.

(34) The Consortium may also decide to seek interim relief in the event that the Council proceeds with the unlawful consideration of the application. If interim relief is to be sought, the Consortium will endeavour, insofar as is possible, to give the Council 7 days notice before any such interim relief is sought from the court.

(35) The Consortium would prefer to resolve this matter as quickly and efficiently as possible. To that end, the Consortium would ask the Council to inform the applicant as soon as possible that insufficient information has been submitted with the application and to state to the applicant that a location plan should be submitted showing the land necessary for visibility splays included within the land outlined in red. Once such a plan is received, the Council could then proceed with the lawful consideration of the application.

(36) The Consortium would be pleased to consider any form of alternate dispute resolution that might be proposed by the Council.

(37) The Consortium intends to issue proceedings as an Aarhus Convention claim pursuant to Parts 45.41 – 45.45 of the Civil Procedure Rules because the claim challenges the legality of a decision of a body exercising a public function which is within the scope of Article 9(2) of the UNECE

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters agreed at Aarhus, Denmark on 25 June 1998 (the Aarhus Convention).

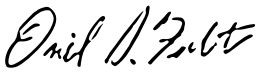
(38) Although funding has not yet been arranged for the claim, the Consortium does not envisage that it will be necessary to propose any variation of the standard limits on recoverable costs as stated in Parts 45.43(2)(b) and 45.43(3) of the Civil Procedure Rules.

(39) In the event that a claim does become necessary, a statement of the prospective claimant's financial resources and a statement of financial support received will be provided to the prospective defendant at the earliest opportunity and no later than the time the claim is issued.

(40) The Consortium's address for the response and service of documents is: Fews Lane Consortium Ltd, The Elms, Fews Lane, Longstanton, Cambridge CB24 3DP. Please note that the Fews Lane Consortium Ltd does NOT accept service by email.

(41) The Consortium would like to propose a reply date of 12 October 2020, which is 14 days from the date of this letter.

Kind regards



Daniel Fulton
Director

IN THE HIGH COURT OF JUSTICE **Claim No.CO/2372/2021**

QUEEN'S BENCH DIVISION
PLANNING COURT IN THE ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN
(on the application of FEWS LANE CONSORTIUM LTD) Claimant

and

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL Defendant

and

LANDBROOK HOMES LTD Interested Party

Exhibit 4
Email from Stephen Reid to Daniel Fulton
dated 16.10.2020 @ 3.18pm

[redacted]

From: Stephen Reid
Sent: 16 October 2020 15:18
To: Daniel Fulton <dgf@fewslane.co.uk>
Subject: Fews LaneOct16th
Importance: High

Dear Fews Lane consortium Ltd

Please see attached letter dated 16th October which I am instructed to send to you .

I am not in the office today and therefore will need to advise you separately when a copy is put in the post to you.

Apologies that the letter was not emailed to you earlier in the week.

Any queries please let me know.

Stephen Reid
Senior Planning Lawyer
3C Shared Services – Legal Practice
Telephone: 0781 7730893
Email: stephen.reid@3csharedservices.org

3C Shared Services
PO Box 700, Cambridge CB1 0JH

Fews Lane Consortium Ltd
The Elms
Fews Lane
Longstanton
Cambridge
CB24 3DP

Practice Ref: SR
Your Ref:

Date: 16th October 2020

Dear Sirs

Re: Judicial review pre-action protocol: 20/02453/S73 - The Retreat, Fews Lane, Longstanton

We write in relation to your pre-action protocol letter dated 28th September 2020 in which you indicate your intention to challenge by way of judicial review the Council's decision to consider the planning permission under ref 20/02453/S73

The Prospective Claimant

1 The Prospective Claimant would be Fews Lane Consortium Ltd.

The Prospective Defendant

2 The Prospective Defendant is South Cambridgeshire District Council.

Correspondence should be addressed to 3C Shared Services – The Legal Practice, South Cambridgeshire Hall, Cambourne Business Park, Cambourne, Cambridge, CB23 6EA.

The Solicitor dealing with the conduct of this matter is Stephen Reid.

Response to the claim

3 Your prospective claim concerns the Council's decision to consider planning application 20/02453/S73 (the "Application").which concerns development proposed at The Retreat, Fews Lane, Longstanton, Cambridge CB24 3DP.

4 The Council has noted that the prospective claimant considers the applicant, Landbrook Homes Ltd ("Landbrook") to be an interested party and that a copy of your letter has been sent to Landbrook

5 Para (5) of your letter

5.1 The Council has noted your comment that you view its consideration of planning application 20/02453/S73 is unlawful pursuant to section 327A of the Town and Country Planning Act 1990 (the "1990 Act") because you suggest "..the application for the existing planning permission to

which the current application relates does not comply with the requirements of article 7 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (the "2015 Order") .

5.2 The Council does not accept (i) its consideration of planning application 20/02453/S73 is unlawful pursuant to section 327A of the 1990 Act or (ii) that the application for the existing planning permission to which the current application relates does not comply with the requirements of article 7 of the 2015 Order.

6 Para (6) of your letter

The Council agrees that an application submitted under section 73 of the 1990 Act, if approved, will create a new planning permission that runs alongside the extant planning permission

7 Para (7) of your letter

7.1 Your reference to section 73 of the 1990 Act is noted but it is thought that it would also have been helpful if you had specifically quoted that part of section 73 (2) of the 1990 Act which provides as highlighted in yellow below

73 Determination of applications to develop land without compliance with conditions previously attached.

(1) This section applies, subject to subsection (4), to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.

(2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and—

(a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and

(b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application.

7.2 Whilst your comments as to Stefanou are noted to my mind a critical point is the following reference in Stefanou

".. a local authority considering an application submitted under section 73 the 1990 act must consider the entire scheme being applied for .."

7.3 The Council's position is that this is exactly what the Council intends to do in relation to the s.73 application

7.4 The facts in the case of Stefanou are materially different to those in this case and it is the Council's position that no material considerations have been, or will be, overlooked in this case.

8 Para (10) of your letter

8.1 You quote Article 7 of the 2015 Order and you add emphasis in bold print as to parts of Article 7 but such emphasis does not include the following :

"…(c) except where the application is made pursuant to section 73.. of the 1990 Act

8.2 The Council considers Article 7(1) (c) is particularly material in this case because the effect of Article 7(1) (c) is that no new location plan needs to accompany a section 73 application

9 Para (12) of your letter

9.1 In your para numbered (12) you say as follows:

"….The Consortium intends to submit that the reason that article 7(1)(c) does not apply to applications submitted pursuant to section 73 of the 1990 Act is because it is presumed that the original application on which the existing planning permission was granted included "a plan which identifies the land to which the application relates"……"

9.2 May I remind you that when I emailed you on 26th August I included at para 17 of that email the following:

"17 I note your comment "..that judicial review proceedings will be issued if this matter is not resolved by Thursday, 27 August 2020.." but I note you do not state what from your perspective would achieve a resolution of this matter and may I add that when I wrote to you on 18th August I included the following :
"….3 .Subject to the applicant submitting a red line location plan identical to that submitted under planning reference S/0277/19/FL and/or the applicant confirming the s.73 application is in relation to the same red line location plan submitted under planning reference S/0277/19/FL any claim challenging a planning permission because the red line location plan does not show vehicular visibility splays will be considered to be without merit and will be resisted…"

I raise the above again as I can also now add that on 21st August Mr Caddoo emailed the planning case officer and said:

"..In response to your recent email, I would ask the Council to please accept this email as confirmation on behalf of the applicant, Landbrook Homes Ltd , that the S.73 application under 20/02453/s73 is in relation to the same red line location plan submitted under planning reference S/0277/19/FL…"

10 Para (13) of your letter

It is not accepted that the Council granted planning permission despite the fact that the land to which the planning application relates was not correctly identified at the time the application for the existing planning permission was made.

11 Para (14) of your letter

It is not accepted by the Council (i) that the plans submitted with the application for the existing planning permission failed to correctly identify the land to which the application relates or (ii) that the requirements of article 7 of the 2015 have not been satisfied, and accordingly, the Council does not accept that the s.73 application cannot be entertained by the Council pursuant to the provisions of section 327A of the 1990Act.

12 Para (22) of your letter

12.1 The Council was pleased to see that you acknowledge that not every planning application will require visibility splays and that you give as an example that if an application were submitted for a city centre development where no vehicular access to the site was possible, visibility splays would obviously not be required.

12.2 The Council has also noted however that the Consortium intends to submit that where an application creates a new vehicular access or proposes the intensified use of an existing vehicular access, the land necessary for visibility splays must be included within the area defined by the red line on the location plan.

12.3 The Council will strenuously resist any submission that a red line is not correct where it omits to include required visibility splays where such visibility splays are with the existing adopted highway

13 Para (23) of your letter

13.1 At para (23) of your letter you say:

"The requirements of article 7 of the 2015 Order are statutory requirements, and neither local planning authorities nor the Secretary of State have the power to ignore the statutory requirements in any case. Any dispute as to whether the statutory requirements have been met is a question within the jurisdiction of the courts. This question can be contrasted with the question of whether visibility splays are necessary to make a proposed development or change of use acceptable in planning terms, which is a question of judgment purely within the purview of the decision maker, subject to the usual legal tests on unreasonableness."

13.2 The Council's position is that such a proposition is correct then literally thousands of planning applications up and down the country should be re-visited and be held to be invalid because they do not show within the red line relevant visibility splays which are within the existing adopted highway. The same point should likewise apply to a whole host of current appeals where again the applications which are the subject of those appeals do not show within the red line on the location plan relevant visibility splays which are within the existing adopted highway .The reference to appeal cases is also pertinent in the context of your comments under your para 23 where, in effect ,you suggest the Secretary of State does not have the power to ignore the statutory requirements in any case.

14. Para 24 of your letter

14.1 At para (24) of your letter you acknowledge that the Council has previously obtained legal advice. You state that no authorities have been provided in support of the Council's position but you omit to acknowledge that the full written advice of Mr Streeten (albeit in relation to a different site) was shared with you and/or that you take issue with the following numbered paragraphs of that Advice (see section 27 of this letter as below)

Paras numbered 7,8,10,11,12,14,16 and 18

14.2 Rather you argue that the Council's position is at odds with the approved principles of statutory interpretation as outlined earlier in your letter.

14.3 The Council does not accept that the position it supports is at odds with the approved principles of statutory interpretation as outlined earlier in your letter

15 Para 25 of your letter

At para (25) of your letter you suggest that "a visibility splay will not be maintained free of vegetation without some sort of intervention…" and you suggest that this "..intervention can either take the form of regular and ongoing maintenance to remove vegetation or the installation of hardstanding such as asphalt or concrete, which would prevent the growth of vegetation.." which then leads on to your comments under your para 26

16 Para 26 of your letter

16.1 At para (26) of your letter you suggest that "…the ongoing maintenance of land necessary to remove vegetation and maintain a functional visibility splay requires a positive planning condition to be attached to any permission granted…" and you continue by suggesting "… a positive planning conditions may only be applied to land that is within the application site or within the control of the applicant…"

16.2 The Council does not accept that a positive planning condition is required in relation to relevant visibility splays which are wholly within the existing adopted highway

16.3 The Council does not accept that the decision in *Mouchell Superannuation Fund Trustees v Oxfordshire County Council* supports a proposition that a positive condition is required for visibility splays which are wholly within the existing adopted highway

17 Para 27 of your letter

17.1 It is not accepted that the Council's interpretation of Article 7 would "…create the very kind of mischief.. "that you suggest "article 7 and the instructions in the application form were apparently designed to prevent…"

17.2 If that were the case then I would invite to explain why the Council's interpretation is consistent not only with other LPAs but also countless decisions of Planning Inspectors in countless Appeal decisions

17.3 You also suggest that

"…If the interpretation of article 7 as advanced in the Council's legal advice were to be accepted, it would be impossible to attach positive conditions requiring the maintenance of visibility splays in cases where the land in question did not require a change of use or operational development…" but I would ask you to provide a single example of where a condition has been imposed in relation to relevant visibility splays within the existing adopted highway.

18 Para 29 of your letter

You comment at para (23) of your letter that

"..there may be many ways to achieve functional visibility splays for any given application, for example, by a positive condition, a Grampian condition, or through a planning obligation…"

but you omit to also include the highway authority using their powers to achieve functional visibility splays where such are within the existing adopted highway and I do not think it unreasonable to ask why the highway authority are not more concerned about the point at issue if you are right that their powers are not sufficient in relation to visibility splays within the existing adopted highway.

19 Para 30 of your letter

19.1 At para (30) of your letter you suggest that:

"…For a local planning authority to accept as valid and to proceed to consider a planning application that plainly fails to comply with the requirements of article 7 and the requirements stated in the application form, would in effect remove the option of the positive planning condition from the decision maker's choices. This effectively constitutes predetermination of the application, at least in regards to a positive condition for the maintenance of visibility splays, and where the issue of visibility splays goes to the root of the decision as to whether to grant planning permission, this predetermination may be sufficient for the court to decide to quash a planning permission granted in such circumstances…."

19.2 I would submit your reasoning is quite simply flawed

20 Para 31 of your letter

20.1 At para (31) of your letter you suggest that:

"…The failure to properly identify the land to which the application relates is also extraordinarily prejudicial to the ability of statutory consultees and members of the public to give intelligent consideration and response to planning proposals during periods of consultations…."

20.2 You have however recognized elsewhere that there are no reported cases which support your proposition that a planning application will be invalid if the red line location plan omits to include relevant visibility splays which are part of the existing adopted highway.

21 Para 32 of your letter

21.1 The highway authority does not share your view that a planning application is invalid if the red line on the location plan does not include visibility splays which are within the existing adopted highway

21.2 It is the Council's case that there has not been any procedural impropriety in relation to the consultation arising from the red line shown on the location plan.

22 Para 33 of your letter

Noted, but the Council will strenuously resist any order to prohibit the Council from considering the Application or any application for a quashing order of a planning permission resulting from the Application.

23 Para 34 of your letter.

Noted, but again the Council will seek to resist any application for interim relief if such an avenue were pursued

24 Para 35 of your letter

The Council does not accept that insufficient information in relation to the red line has been submitted and accordingly that it has no intention of advising the applicant to that effect

25 Para 36 of your letter

The Council would likewise be willing to consider any form of alternative dispute resolution if it is felt by the Consortium that matters are capable of resolution but the Council is currently of the view that the Consortium is wholly misguided in the approach set out in the pre -action protocol letter

26 Paras 37-40 of your letter

Noted

27. May I also remind you of a number of paragraphs in the Advice from Charles Streeten of 20 July 2020 (albeit in relation to a different site) which Advice was copied to you in full and where a number of paragraphs from that Advice are set out below for ease of reference as it is believed they have not been addressed in the pre-action letter dated 28th September

27.1 Paragraph numbered 7

"It should, however, be noted that notwithstanding the apparently strict wording of section 327A, the High Court has made clear that a breach of the requirements in the 2015 Order does not, necessarily, mean that a grant of planning permission will be quashed (see *R (Bishop) v Westminster CC* [2017] EWHC 3102 (Admin) at para. 23). Rather, the court retains its discretion regarding whether or not to quash a planning permission granted in breach of the 2015 Order. Indeed, in a case where it is 'highly likely' that the outcome would not have been substantially different absent the error, the court is under a duty pursuant to section 31 of the Senior Courts Act 1981 (as amended) to refuse both permission for judicial review and relief."

27.2 Paragraph numbered 8

"Thus, whilst local planning authorities should always seek to ensure that the requirements of the 2015 Order are properly followed, it may be that an inadvertent failure to follow the procedural requirements set down is not fatal to a grant of planning permission."

27.3 Paragraph numbered 10

"The section of the application form to which the Consortium refers reads:
"The application site must be edged clearly with a red line on the location plan. It should include all land necessary to carry out the proposed development (e.g. land required for access to the site from a public highway, visibility splays (access around a road junction or access, which should be free from obstruction), landscaping, car parking and open areas around buildings)."

27.4 Paragraph numbered 11

"This is also reflected in the Government's Planning Practice Guidance ("**PPG**") which says at reference ID 14-024-20140306:

"The application site should be edged clearly with a red line on the location plan. It should include all land necessary to carry out the proposed development (eg land required for access to the site from a public highway, visibility splays, landscaping, car parking and open areas around

buildings). A blue line should be drawn around any other land owned by the applicant, close to or adjoining the application site."

27.5 Paragraph numbered 12

"In interpreting these words it is important not to lose sight of their context. They have not been drafted as would a policy, still less with the care given to the drafting of legislation. In both cases are intended as practical guidance to those completing an application for planning permission. They should therefore be read with a considerable degree of common sense and not subjected to exegetical legal analysis. If authority is required for this proposition, it is to be found in *R (Solo Retail Limited) v Torridge DC* [2019] EWHC 489 (Admin) at para. 33."

27.6 Paragraph numbered 14

"The issue, therefore, is whether planning permission for the Development can be granted, notwithstanding that an area included within the visibility splay is on adopted highway outside the red line boundary. My view is that it can:

a. Firstly, the text of both the application form and the guidance refers to "all land necessary to carry out the proposed development". In my view, the word development is of central importance. If land is not being developed, it does not need to be included within the red line boundary. Thus, although land that is not adopted highway such that its use needs to be changed to be used as a visibility splay, it may need to be shown within the red line boundary, where the land used for the visibility splay is already adopted highway, and no operational development is required, it does not need to be included within the red line.

b. Secondly, an over literal reading of the application form and PPG would create absurd results. As those instructing rightly point out, both refer to car parking and open areas around buildings. However, if the development proposed does not include any car parking it plainly would not be invalid if the red line on the location plan did not show land for car parking. Similarly, if the application was such that the footprint of a proposed building meant there were to be no open areas around it, the effect of the application form is clearly not intended to be that the application is invalid because it fails to show any open areas. On the contrary, as both the form and the PPG make clear, the references given are mere examples, and are not intended to be prescriptive or exhaustive. Ultimately, what land is necessary to carry out the proposed development will be a matter of judgement for the local planning authority to determine on the facts of any given case.

27.7 Paragraph numbered 16

"Applying these principles, in my opinion:

Provided that all of the relevant land upon which works to create the access for the Development fall within the red line boundary, the Council would be entitled to conclude that the land necessary to carry out the proposed development does not include land falling within the visibility splays but outwith the red line boundary, which is adopted highway."

27.8 Paragraph numbered 18

"Moreover, even if I am wrong about that, I am of the view that the prospects of bringing a successful claim for judicial review would be low. I cannot see what prejudice could be said to result from not including adopted highway land forming part of the visibility splay within the red line boundary for the development and, in any event, a claim for judicial review would be likely to be refused permission and/or relief pursuant to section 31 of the Senior Courts Act 1981 on the basis that it is highly likely the outcome would not have been substantially different absent any error of law identified."

Yours faithfully

Stephen Reid
Senior Planning Lawyer
acting for South Cambridgeshire District Council

Tel: 01223 457094 / 07817 730893
Email: stephen.reid@3csharedservices.org

IN THE HIGH COURT OF JUSTICE **Claim No.CO/2372/2021**

QUEEN'S BENCH DIVISION
PLANNING COURT IN THE ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN
(on the application of FEWS LANE CONSORTIUM LTD) Claimant

and

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL Defendant

and

LANDBROOK HOMES LTD Interested Party

Exhibit 5
Email from Daniel Fulton to Stephen Reid
dated 30.04.2021 @ 11.19am

[redacted]

[redacted]

From: Daniel Fulton <dgf@fewslane.co.uk>
Sent: 30 April 2021 11:19
To: Stephen Reid <Stephen.Reid@3csharedservices.org>
Subject: Judicial review pre-action protocol letter: 20/02453/S73 & 20/05101/FUL (Fews Lane, Longstanton)

Dear Mr Reid,

Please see the attached pre-action letter concerning planning applications 20/02453/S73 and 20/05101/FUL, which concern proposed development at Fews Lane, Longstanton.

Kind regards,

Daniel Fulton
Director

Fews Lane Consortium Ltd
The Elms
Fews Lane
Longstanton
Cambridge
CB24 3DP

tel. 01954 789237

Fews Lane Consortium Ltd

Daniel Fulton
DIRECTOR

T: 01954 789237
E: dgf@fewslane.co.uk

The Elms
Fews Lane
Longstanton
Cambridge
CB24 3DP

30 April 2021

South Cambridgeshire District Council
South Cambridgeshire Hall
Cambourne Business Park
Cambourne
Cambridge CB23 6EA

Dear Sir/Madam

Judicial review pre-action protocol letter: Planning applications 20/02453/S73 & 20/05101/FUL

(1) South Cambridgeshire District Council (the "**Council**"), South Cambridgeshire Hall, Cambourne Business Park, Cambourne, Cambridge CB23 6EA, is the prospective defendant in a claim for judicial review. In light of the Council's current remote working arrangements, this correspondence has been sent by email only.

(2) The prospective claimant is the Fews Lane Consortium Ltd (the "**Consortium**"), The Elms, Fews Lane, Longstanton, Cambridge CB24 3DP. The Consortium represents the interests of local residents in regards to issues of planning and development.

(3) The Council has decided to entertain two purported applications for planning permission (references 20/02453/S73 and 20/05101/FUL) despite the applications' noncompliance with the statutory requirements pursuant to the Town and Country Planning Act 1990 (the "**1990 Act**") and the Town and Country Planning (Development Management Procedure) (England) Order 2015 (the "**2015 Order**"). The Council's decisions to entertain purported planning applications 20/02453/S73 and 20/05101/FUL are to be challenged through judicial review.

(4) The prospective claimant considers the applicant for planning permission, Landbrook Homes Ltd, to be an interested party. A copy of this letter has been sent to Landbrook Homes Ltd at 36a Church Street, Willingham, Cambridge CB24 5HT.

(5) Article 7(1) of the 2015 Order provides that:

> "an application for planning permission must—
> (a) be made in writing to the local planning authority on a form published by the Secretary of State (or a form to substantially the same effect);
> (b) include the particulars specified or referred to in the form;
> (c) except where the application is made pursuant to section 73 (determination of applications to develop land without conditions previously attached) or section 73A(2)(c) (planning permission for development already carried out) of the 1990 Act or is an application of a kind referred to in article 20(1)(b) or (c), be accompanied, whether electronically or otherwise, by—
> (i) a plan which identifies the land to which the application relates;
> (ii) any other plans, drawings and information necessary to describe the development which is the subject of the application".

(6) The application form for planning permission specifies that a location plan must be submitted that complies with the following instructions:

> "The application site must be edged clearly with a red line on the location plan. It should include all land necessary to carry out the proposed development (e.g. land required for access to the site from a public highway, visibility splays (access around a road junction or access, which should be free from obstruction), landscaping, car parking and open areas around buildings)."

(7) Section 327A of the 1990 Act provides that:

> "(1) This section applies to any application in respect of which this Act or any provision made under it imposes a requirement as to—
> (a) the form or manner in which the application must be made;
> (b) the form or content of any document or other matter which accompanies the application.
> (2) The local planning authority must not entertain such an application if it fails to comply with the requirement."

(8) In *Maximus Networks Ltd v Secretary of State for Communities and Local Government* [2018] EWHC 1933 (Admin), [2019] PTSR 312, Dove J states at [24] that:

> "Section 327A of the 1990 Act makes clear that the local planning authority has no discretion to waive or overlook failures to comply with the requirements provided by the legislation for the proper formulation of an application. By implication it makes clear that if a local planning authority were to do so that would amount to an error of law justifying the court's intervention."

(9) The land outlined in red on the location plan submitted with purported application 20/05101/FUL does not include all the land necessary to carry out the proposed development. Specifically, the land outlined in red fails to include the land required for visibility splays.

(10) Purported application 20/02453/S73 has been submitted pursuant to section 73 of the 1990 Act. Pursuant to article 7(1)(c)(i) of the 2015 Order, no location is required for when submitting an application under section 73, presumably because the application for underlying planning permission was valid when it was determined.

(11) Purported application 20/02453/S73 seeks permission for the same development approved in permission S/0277/19/FL but subject to different conditions. In the case of purported application S/0277/19/FL, the area outlined in red on the location plan, which is relied upon also by purported application 20/02453/S73, failed to include all the land necessary to carry out the proposed development. Specifically, the land outlined in red failed to include the land required for visibility splays.

(12) Unless or until the purported applications comply with the statutory requirements, under section 327A of the 1990 Act, the prospective defendant has no jurisdiction to entertain, much less approve, either application.

(13) Accordingly, the prospective claimant intends to seek an order prohibiting the prospective defendant from continuing the entertain the purported planning applications in question and an order that the prospective defendant pay the prospective claimant's costs in the claim.

(14) Section 31 of the Senior Courts Act 1981 provides that:

> "(3C) When considering whether to grant leave to make an application for judicial review, the High Court—

(a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and
(b) must consider that question if the defendant asks it to do so.

(3D) If, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave."

(15) In the case of the two purported applications in question, the decision of the prospective defendant to unlawfully entertain the purported applications despite their noncompliance with the statutory requirements is highly likely to directly prejudice the interests of the claimant.

(16) In *Mouchell Superannuation Fund Trustees v Oxfordshire County Council* [1992] 1 PLR 97 (at 105), Glidewell LJ states that:

> "the combined effect of section 14(1) and (2) of the 1947 Act [which is equivalent to section 29(1)and 30(1) of the 1971 Act] was, and the combined effect of the successor provisions in the current legislation is, that a condition requiring the carrying out of works may validly be imposed only if the works are to be carried out on land either within the application site or on other land 'under the control of the applicant'. Thus, a condition purporting to require the carrying out of works on land neither within the application site nor within the control of the applicant is outside the powers of the Act."[1]

(17) Ordinarily when granting planning permission with vehicular access to an adopted public highway, a positive planning condition is typically necessary to requiring ongoing maintenance for the visibility splays in question.

(18) However, in this case, the prospective defendant has decided to entertain purported planning applications where that land necessary for visibility splays has been specifically excluded from the application site in contravention of the requirements of the 2015 Order. This effectively prevents a condition for adequate visibility splays from being attached to any permission granted.

(19) The Consortium intends to issue proceedings as an Aarhus Convention claim pursuant to Parts 45.41 – 45.45 of the Civil Procedure Rules because the claim challenges the legality of a decision of a body exercising a public function which is within the scope of Article 9(2) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters agreed at Aarhus, Denmark on 25 June 1998 (the Aarhus Convention).

(20) The Consortium does not envisage that it will be necessary to propose any variation of the standard limits on recoverable costs as stated in Parts 45.43(2)(b) and 45.43(3) of the Civil Procedure Rules.

(21) Should it become necessary to issue a claim, a complete statement of the prospective claimant's financial resources and a statement of financial support received will be provided to the prospective defendant at the earliest opportunity and, in any event, will be served with the claim form. At present, the Consortium's total assets are less than £25, and the Consortium's total cash on hand is less than £25.

(22) The Consortium's address for the response and service of documents is: Fews Lane Consortium Ltd, The Elms, Fews Lane, Longstanton, Cambridge CB24 3DP. The Consortium will accept a pre-action protocol response by email to <dgf@fewslane.co.uk>.

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[1] The successor provisions in the 1990 Act are sections 70(1) and 72(1).

(23) In the event that legal proceedings become necessary in regards to this prospective claim, please note that the Fews Lane Consortium Ltd does NOT accept service by email.

(24) The prospective claimant would like to propose 14 May, which is 14 days from today, as the date for any pre-action protocol response.

Kind regards,

Daniel Fulton
Director

IN THE HIGH COURT OF JUSTICE **Claim No.CO/2372/2021**

QUEEN'S BENCH DIVISION
PLANNING COURT IN THE ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN
(on the application of FEWS LANE CONSORTIUM LTD) Claimant

and

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL Defendant

and

LANDBROOK HOMES LTD Interested Party

Exhibit 6
Email from Stephen Reid to Daniel Fulton
dated 14.05.2021 @ 4.17pm

[redacted]

From: Stephen Reid
Sent: 14 May 2021 16:17
To: Daniel Fulton <dgf@fewslane.co.uk>
Cc: Kelly Stephen <Stephen.Kelly@greatercambridgeplanning.org>; Sharon Brown <Sharon.Brown@greatercambridgeplanning.org>; Toby Williams <Toby.Williams@greatercambridgeplanning.org>; Lewis Tomlinson <Lewis.Tomlinson@greatercambridgeplanning.org>
Subject: FW: S.73 response

Dear Fews Lane Consortium Limited

I am instructed to email you the attached.

I will make arrangements for a hard copy to be sent in the post to you but please note this will not be until next week.

Stephen Reid

3C Shared Services
PO Box 700, Cambridge CB1 0JH

Fews Lane Consortium Limited

Date:14th May 2021

Dear Sirs

Proposed claim for judicial review in relation to prospective planning permission 20/02453/s73 and 20/05101/FUL

We write in relation to your pre-action protocol letter dated 30th April 2021 in which you indicate your intention to challenge by way of judicial review the Council's decision to entertain planning applications under ref 20/02453/s73 and 20/05101/FUL

The Prospective Claimant

1 The Prospective Claimant would be Fews Lane Consortium Limited.

The Prospective Defendant

2 The Prospective Defendant is South Cambridgeshire District Council.

Correspondence should be addressed to:
3C Shared Services – The Legal Practice
South Cambridgeshire Hall
Cambourne Business Park
Cambourne
Cambridge CB23 6EA

The Solicitor dealing with the conduct of this matter is Stephen Reid.

Response to the claim

3 The first matter that I would draw to your attention is that the application under reference 20/05101/FUL is now the subject of an appeal (for non-determination) and whilst the Council is waiting to be advised as to the allocation of an Appeal Inspector the Council's position is that this application is no longer within its jurisdiction as Local Planning

Authority and therefore it is intended that this response letter will only address matters in relation to the application under planning reference 20/02453/s73.

4. You will recall that Fews Lane Consortium Limited had previously issued a Pre Action Protocol letter dated 27th July 2020 in relation to the application under 20/02453/s73 and where a response was sent dated 18th August 2020 and therefore in the first part of this response I intend to again address a number of points as set out in that response.

5 In the second part of this response I intend to then seek to address matters which have arisen post 18th August where I believe them to be relevant.

6 However, before moving to the first part of the response there is an initial point that I would like to highlight namely that the Council received an email from Mr Caddoo dated 21st August 2020 in which he asked the Council to accept the email as "..confirmation on behalf of the applicant, Landbrook Homes Ltd, that the S.73 application under 20/02453/s73 is in relation to the same red line location plan submitted under planning reference S/0277/19/FL…"

FIRST PART

7 Your claim challenges a section 73 application under planning reference 20/02453/s73 (the "s.73 Application") in relation to the grant of planning permission for the erection of 2 dwellings with parking.

8 The principles on which a claim for judicial review of a decision to grant planning permission may be brought have been shortly stated by Lord Justice Lindblom in Mansell v Tonbridge and Malling BC [2017] EWCA Civ 1314 at paragraph 42. We do not set out these fundamental principles in full in this letter but they are referred to where appropriate below.

9 While your letter of 30th April 2021 makes various assertions by way of complaint about the omission of visibility splays it is felt the Consortium has failed to substantiate how an alleged error of law will arise.

10 The Council has noted earlier complaints on a similar matter in relation to a planning application for development in Waterbeach. In response to that complaint, the Council sought advice from Counsel and responded to the consortium. The Council's advice from Charles Streeton of Counsel on that matter was provided to the Consortium.

11 Turning to the points made at paragraph 10 of your letter dated 27th July 2020, and which is set out below for ease of reference.

"..(10) The question of whether or not visibility splays are required in order for the proposed development to be acceptable in planning terms is a matter of planning judgment that is within the purview of the decision maker. However, pursuant to section 327A of the 1990 Act, the Council does not have the discretion to decide that it will entertain an application that fails to comply with a requirement as to the form or content of any document which accompanies the application…"

12 The basis of the Consortium's proposed claim is an allegation that any decision to grant planning permission for the Development pursuant to the S.73 Application would not accord with the requirements imposed by the Town and Country Planning (Development Management Procedure) (England) Order 2015 ("the **2015 Order**") and thus would also be in breach of section 327A of the Town and Country Planning Act 1990 ("the **1990 Act**"). It appears alleged that the land outlined in red on the location plan for

S/0277/19/FL does not include all of the land necessary to carry out the proposed development as it does not include all of the land required for visibility splays.

13 In relation to a similar point raised by the Consortium albeit on a completely different site and in a completely different location Charles Streeten of FTB has advised that for the reasons set out further below he was of the opinion that:

a The Council granting planning permission for development which relies on adopted highway land outside the red line site boundary as part of the visibility splays is not in breach of the requirements of the 2015 Order.

b Provided land on which any operational development will take place is within the red line boundary, and the remaining land is adopted highway, Mr Streeten is of the view that the requirements of the 2015 Order will be complied with and it is not necessary to include in the red line boundary all of the land required as visibility splay where such land is part of the adopted highway.

c Even if he is wrong in relation to the above, the prospect of a claim for judicial review succeeding in the case where he was asked to advise was low. Given the similarities of that matter and the current complaint, the Council is of a similar opinion in relation to the S.73 Application not least having regard to the confirmation referred to at paragraph numbered 6 above.

14 **LAW**

The Statutory Scheme

14.1 The 2015 Order is made, inter alia, pursuant to section 59 of the 1990 Act. It dictates the procedure by which planning applications must be determined.

14.2 Section 327A of the 1990 Act states:

"(1) This section applies to any application in respect of which this Act or any provision made under it imposes a requirement as to—(a) the form or manner in which the application must be made; (b) the form or content of any document or other matter which accompanies the application.

(2) The local planning authority must not entertain such an application if it fails to comply with the requirement."

14.3 A local planning authority should not entertain an application for planning permission unless it complies with the requirements of the 2015 Order but please note the comments under paragraphs numbered 12 and 22 below.

15 **Non-Compliance with the DMOP**

15.1 It should, however, be noted that notwithstanding the apparently strict wording of section 327A, the High Court has made clear that a breach of the requirements in the 2015 Order does not, necessarily, mean that a grant of planning permission will be quashed (see R (Bishop) v Westminster CC [2017] EWHC 3102 (Admin) at para. 23). Rather, the court retains its discretion regarding whether or not to quash a planning permission granted in breach of the 2015 Order. Indeed, in a case where it is 'highly likely' that the outcome would not have been substantially different absent the error, the court is under a duty pursuant to section 31 of the Senior Courts Act 1981 (as amended) to refuse both permission for judicial review and relief.

16 **Article 7 of the 2015 Order**

16.1 Article 7 of the 2015 Order is entitled "General requirements: applications for planning permission including outline planning permission". Article 7(1)(b) requires that an application for planning permission must "include the particulars specified or referred to in the form". It should also be noted that Article 7(1)(c) requires the application be accompanied inter alia by (i) a plan which identifies the land to which the application relates; (ii) any other plans, drawings and information necessary to describe the development which is the subject of the application.

16.2 The section of the application form to which the Consortium referred to in the letter of 27th July 2020 reads as follows:

"The application site must be edged clearly with a red line on the location plan. It should include all land necessary to carry out the proposed development (e.g. land required for access to the site from a public highway, visibility splays (access around a road junction or access, which should be free from obstruction), landscaping, car parking and open areas around buildings)."

17 This is also reflected in the Government's Planning Practice Guidance ("**PPG**") which says at reference ID 14-024-20140306:

"The application site should be edged clearly with a red line on the location plan. It should include all land necessary to carry out the proposed development (eg land required for access to the site from a public highway, visibility splays, landscaping, car parking and open areas around buildings). A blue line should be drawn around any other land owned by the applicant, close to or adjoining the application site."

18 In interpreting these words Mr Streeten has advised that it is important not to lose sight of their context. They have not been drafted as would a policy, still less with the care given to the drafting of legislation. In both cases are intended as practical guidance to those completing an application for planning permission. They should therefore be read with a considerable degree of common sense and not subjected to exegetical legal analysis. If authority is required for this proposition, it is to be found in R (Solo Retail Limited) v Torridge DC [2019] EWHC 489 (Admin) at para. 33.

ANALYSIS

19 The particular point at issue is the location of any visibility splays required to ensure the access to the Development is safe. In relation to the visibility splays for the junction of Fews Lane and High Street Longstanton all the land outside the red line boundary covered by those visibility splays is within the existing adopted highway. The Highway Authority officers have confirmed their view that no other land is required to secure the necessary visibility for this development.

20 The issue, therefore, is whether planning permission for the Development can be granted pursuant to the S.73 Application, notwithstanding that an area included within the visibility splay is on adopted highway outside the red line boundary. The view of the Council is that it can:

20.1 Firstly, the text of both the application form and the guidance refers to "all land necessary to carry out the proposed development". Mr Streeten's has expressed a view that the word "development" is of central importance. If land is not being developed, it does not need to be included within the red line boundary. Thus, although land that is not adopted highway such that its use needs to be changed to be used as a visibility splay may need to be shown within the red line

boundary. Where, however, the land used for the visibility splay is already adopted highway, and no operational development is required, it does not need to be included within the red line.

20.2 Secondly, Mr Streeten has advised that an over literal reading of the application form and PPG would create absurd results. As I have pointed out to you in the past, both refer to car parking and open areas around buildings. If, however, the development proposed does not include any car parking it plainly would not be invalid if the red line on the location plan did not show land for car parking which is not being provided or required. Similarly, if the application was such that the footprint of a proposed building meant there were to be no open areas around it, the effect of the application form is clearly not intended to be that the application is invalid because it fails to show any open areas. On the contrary, as both the form and the PPG make clear, the references given are mere examples, and are not intended to be prescriptive or exhaustive. Ultimately, what land is necessary to carry out the proposed development will be a matter of judgement for the local planning authority to determine on the facts of any given case.

21 Mr Streeten, as a caveat to the above (and leaving aside the questions which arise where works are carried out pursuant to an agreement under section 278 of the Highways Act 1980), advised in relation to the other matter that if operational development such as engineering works are required to provide or alter an access, this may amount to development and should, therefore, be included within the red line boundary.

22 Applying these principles, Mr Streeten expressed an opinion as set out below (in the case where he was asked to advise) :

22.1 Provided that all of the relevant land upon which works to create the access for the Development fall within the red line boundary, the Council would be entitled to conclude that the land necessary to carry out the proposed development does not include land falling within the visibility splays but outwith the red line boundary, which is adopted highway.

22.2 Provided that the red line boundary includes the land upon which operational development is required to provide the access, it is not necessary to include within the red line boundary other land which is adopted highway and forms part of the relevant visibility splay.

23 In the other case, Mr Streeten advised that even if he is wrong, he is of the view that the prospects of bringing a successful claim for judicial review in that case would be low and he cannot see what prejudice could be said to result from not including adopted highway land forming part of the visibility splay within the red line boundary for the development. His view was that he felt a claim for judicial review would be likely to be refused permission and/or relief pursuant to section 31 of the Senior Courts Act 1981 on the basis that it is highly likely the outcome would not have been substantially different absent any error of law identified. The same point is considered by the Council to apply here.

24 In any event, even if (which is denied) there was some error in the validation process, the Court has a discretion whether or not to quash a grant of planning permission, depending on a variety of factors, including:

- the consequences of non-compliance,
- the nature of the failure,
- the identity of the applicant for relief,

- the lapse of time ,and
- the effect on other parties

25 The Consortium have (in the other case where Mr Streeten has advised) suggested that:

"… It is difficult to see how anyone's interests could be prejudiced by the Council insisting that the entire 43 metre x 2.4 metre visibility splays are included within the red line boundaries of the application site, the appropriate notices being served upon the owners of land within the application site, and the appropriate ownership certificate being filed by the applicant…."
It is the Council's view that this suggestion as to extent of the red line boundaries is not the relevant legal test as to whether an application is valid

SECOND PART

26 Officers are of the view that the change sought under the s.73 Application makes no material changes to the actual development proposed and the purpose of the new condition is solely to make detailed provision for construction traffic.

27 Officers are mindful that an approval of a s.73 application results in a new planning permission and not an amendment of the original. Further, whilst the guidance quoted in paragraph 21 of the Officer's Report presented to Planning Committee in [January 2021] is correct to limit attention to conditions that are the subject of the application, officers are also mindful of the need to consider whether any material change of policy or other circumstances which might require a re-assessment of other conditions or, indeed, the development as a whole, see R v Stefanou v Westminster City Council & Ano [2107] EWHC 908 (Admin) at [90].

28 Officers are mindful of the complaints which refer to the inadequacies of the site plan supplied with the original application – but it is submitted it is too late to challenge the validity of the permission pursuant to that original application. Fews Lane Consortium Limited at least at one stage sought to suggest a plan is required by reference to the article 7(1)(b) – which requires particulars to be included as specified in the application form but as a simple matter of statutory interpretation the Council's position is that cannot include a plan which is dealt with separately and expressly by (c).

29 It follows that officers do not consider it is necessary to request a further plan, as indicated in paragraph 3 of the response dated 18th August 2020 but please note reference to confirmation under paragraph numbered 6 above

30 Whilst there has been some debate as to whether pedestrian splays need to be 1.5m x 1.5m or 2m x 2m, it is the Council's position that 1.5m is the correct figure (see points 14 and 15 and 21.3 of a Cambridgeshire County Council letter dated 12th December 2018 but apparently dealing with the same junction – Fews Lane and High Street,

31 There is a further point namely whether all the land required for such splays is on highway land. There is an email from Jon Finney dated 6th January 2021 in which he confirms that it is all on highway land. This is consistent with earlier comments to the same end, and the later email from Jon Finney on the same date confirms this position even though the relevant land is not shown on the highways register. The land forms part of a grass verge.

32 Please correct me if I am wrong but isn't it the contention of Fews Lane Consortium Limited that such land should still have been shown as included within the application site by reference to the statutory provision for operational development on highway land. If that is the contention, then it is the Council's position that any such contention misses

the point as there is no operational development proposed for these visibility splay areas and as it is highway land its use as visibility splays involves no change of use.

33 In his letter Mr Streeten dated 20th July 2020 covered this particular point at paragraph 16(c). With respect to subsequent arguments made by Fews Lane Consortium (e.g. as developed at paragraphs 33-34 of your letter of 8th September 2020) it is the Council's position that these ignore the distinction between operational development on highway land and change of use.

34 Given, as noted above, there is no express requirement for a site location plan (identifying the land to which section 73 application relates) and the proposed change of one condition does not relate to visibility splays, it is the Council's position that any challenge in relation to the s.73 Application is one which is unlikely to succeed

35 Notwithstanding what Fews Lane say as to the apparent stringent terms of section 327A of the 1990 Act, the Court will still have a discretion as to whether or not to quash. Mr Streeten deals with this in his Advice (at paragraph 7), and I would add to the case references made by Mr Streeten reference to the case of Maximus Networks Ltd v SSCLG and Southwark LBC and LH Hammersmith and Fulham [2018] EWHC 1933 (Admin) at [24-26]

36 Whilst in paragraph (18) of your letter dated 30th April 2021 you have said as set out below it is the Council's position that when a fresh report is taken to Planning Committee as to the sS.73 Application it will address the extent of the red line for the purposes of the s.73 Application and the need for any visibility splays and where they are located if outside of the red line

"(18) However, in this case, the prospective defendant has decided to entertain purported planning applications where that land necessary for visibility splays has been specifically excluded from the application site in contravention of the requirements of the 2015 Order. This effectively prevents a condition for adequate visibility splays from being attached to any permission granted…"

37 Officers are satisfied that the Application under reference S/0277/19/FL and the associated committee report considered representations concerning the adequacy of the access to the plot, proposed improvements including the widening of the Fews Lane access, visibility splays and the extent of the red line. Fews Lane Consortium are asked to acknowledge that the permission granted pursuant to that application can no longer be judicially challenged.

38 Notwithstanding that the s.73 Application seeks to amend only the Traffic Management Plan, the officer report to be presented to Planning Committee before determination of the S.73 Application will consider the representations of Fews Lane Consortium Limited , the necessity and reasonableness of requiring upgrades to Fews Lane through the S73 Application including the provision of visibility splays.

39 Officers of the Council are satisfied that as the local Planning Authority it does have jurisdiction to entertain the S73 Application and for all of the reasons set out or referred to above, the Council will resist any application for judicial review.

40 The Council has noted that the Consortium has not indicated if it would prefer to resolve the dispute without the need for legal proceedings or whether the Consortium would agree to participate in an appropriate form of ADR. In the other case referred to above, the Consortium were sent a copy of the advice from Mr Streeten and the Consortium were invited to take their own advice from counsel so that any points in such an advice could be put to Mr Streeten for him to review. It is not clear if such advice has been

sought by the Consortium, notwithstanding the Council's invitation and in these circumstances the Council reserves the right to bring to the Court's attention the invitation which was made in such regard . The Council is also mindful that in a conversation on 20th April 2021 Mr Fulton said that he had received written "legal advice" and which "legal advice" he said he would share it with Council the same day but a copy of that "legal advice" has never been forthcoming.

41 Finally, the Council agrees that the applicant for the S.73 Application , Landbrook Homes Ltd , would be an interested party in respect of any claim.

Yours faithfully

Stephen Reid
Senior Planning Lawyer
acting for South Cambridgeshire District Council

Tel: 01223 457094
Email: stephen.reid@3csharedservices.org

IN THE HIGH COURT OF JUSTICE **Claim No.CO/2372/2021**

QUEEN'S BENCH DIVISION
PLANNING COURT IN THE ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN
(on the application of FEWS LANE CONSORTIUM LTD) Claimant

and

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL Defendant

and

LANDBROOK HOMES LTD Interested Party

Exhibit 7
Email from Daniel Fulton to Stephen Reid
dated 21.05.2021 @ 11.49am

[redacted]

[redacted]

From: Daniel Fulton <dgf@fewslane.co.uk>
Sent: 21 May 2021 11:49
To: Stephen Reid <Stephen.Reid@3csharedservices.org>
Cc: Toby Williams <Toby.Williams@greatercambridgeplanning.org>; Lewis Tomlinson <Lewis.Tomlinson@greatercambridgeplanning.org>
Subject: 20/02453/S73 - Pre-action protocol letter (No. 2)

Dear Mr Reid,

Please see the attached pre-action protocol letter, which concerns planning application 20/02453/S73 and the provisions of section 65 of the Town and Country Planning Act 1990.

Kind regards,

Daniel Fulton
Director

Fews Lane Consortium Ltd
The Elms
Fews Lane
Longstanton
Cambridge
CB24 3DP

tel. 01954 789237

Fews Lane Consortium Ltd

Daniel Fulton
DIRECTOR

T: 01954 789237
E: dgf@fewslane.co.uk

The Elms
Fews Lane
Longstanton
Cambridge
CB24 3DP

21 May 2021

South Cambridgeshire District Council
South Cambridgeshire Hall
Cambourne Business Park
Cambourne
Cambridge CB23 6EA

Dear Sir/Madam,

Judicial review pre-action protocol letter: Planning application 20/02453/S73 (No. 2)

(1) South Cambridgeshire District Council (the "**Council**"), South Cambridgeshire Hall, Cambourne Business Park, Cambourne, Cambridge CB23 6EA, is the prospective defendant in a claim for judicial review. In light of the Council's current remote working arrangements, this correspondence has been sent by email only.

(2) The prospective claimant is the Fews Lane Consortium Ltd (the "**Consortium**"), The Elms, Fews Lane, Longstanton, Cambridge CB24 3DP. The Consortium represents the interests of local residents in regards to issues of planning and development.

(3) This letter concerns planning application 20/02453/S73, which would permit development at Fews Lane, Longstanton, Cambridge CB24 3DP.

(4) The prospective claimant considers the applicant for planning permission, Landbrook Homes Ltd, to be an interested party. A copy of this letter has been sent to Landbrook Homes Ltd at 36a Church Street, Willingham, Cambridge CB24 5HT.

(5) Article 13(1) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (the "**2015 Order**") provides that "an applicant for planning permission must give requisite notice of the application to any person (other than the applicant) who on the prescribed date is an owner of the land to which the application relates".

(6) The 2015 Order was made pursuant to a number of provisions of the Town and Country Planning Act 1990 (the "**1990 Act**"), including the provisions of section 65 of the Act.

(7) Section 65(5) of the 1990 Act provides that, "A local planning authority shall not entertain an application for planning permission or permission in principle unless any requirements imposed by virtue of this section have been satisfied."

(8) In addition, section 327A of the 1990 Act states:

> "(1) This section applies to any application in respect of which this Act or any provision made under it imposes a requirement as to—
> (a) the form or manner in which the application must be made;
> (b) the form or content of any document or other matter which accompanies the application.

(2) The local planning authority must not entertain such an application if it fails to comply with the requirement."

(9) In *Maximus Networks Ltd v Secretary of State for Communities and Local Government* [2018] EWHC 1933 (Admin), [2019] PTSR 312, Dove J states at [24] that:

> "Section 327A of the 1990 Act makes clear that the local planning authority has no discretion to waive or overlook failures to comply with the requirements provided by the legislation for the proper formulation of an application. By implication it makes clear that if a local planning authority were to do so that would amount to an error of law justifying the court's intervention."

(10) A part of the land to which the application relates (which is not *de minimis*) is registered under title No. CB357875 and is owned by Charles Church Developments Limited (Co. Regn. No. 1182689) of Persimmon House, Fulford, York YO19 4FE.

(11) The ownership certificated submitted by the applicant states that "[a]ll reasonable steps have been taken to find out the names and addresses of everyone else who, on the day 21 days before the date of this application, was the owner and/or agricultural tenant of any part of the land to which this application relates" and that the steps taken were "Searches in Land Registry and advertising in local newspaper". These statements appear to be false or misleading in a material particular.

(12) Regardless, the registered owner of part of the land to which the application relates (Charles Church Developments Limited) has not been notified by the applicant as required under article 13 of the 2015 DMPO, and accordingly, the application can not be entertained by the local planning authority pursuant to sections 65(5) and 327A of the 1990 Act.

(13) The council should inform the applicant that the application can not be entertained by the council. As the application is due to be considered by the council's planning committee on Wednesday, an update on the status of this application should be published on the planning committee agenda page on the council's website.

(14) Should the council not take the steps stated above, the Fews Lane Consortium Ltd will apply to the High Court for an order to prohibit the council from entertaining the application, a declaration that the council erred in law, and an order that the council pay the Consortium's costs in the claim. Injunctive relief may also be sought, including on an urgent basis, if appropriate.

(15) The Consortium intends to issue proceedings as an Aarhus Convention claim pursuant to Parts 45.41 – 45.45 of the Civil Procedure Rules because the claim challenges the legality of a decision of a body exercising a public function which is within the scope of Article 9(2) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters agreed at Aarhus, Denmark on 25 June 1998 (the Aarhus Convention).

(16) The Consortium does not envisage that it will be necessary to propose any variation of the standard limits on recoverable costs as stated in Parts 45.43(2)(b) and 45.43(3) of the Civil Procedure Rules.

(17) Should it become necessary to issue a claim, a complete statement of the prospective claimant's financial resources and a statement of financial support received will be provided to the prospective defendant at the earliest opportunity and, in any event, will be served with the claim form. At present, the Consortium's total assets are less than £25, and the Consortium's total cash on hand is less than £7.

(18) The Consortium's address for the response and service of documents is: Fews Lane Consortium Ltd, The Elms, Fews Lane, Longstanton, Cambridge CB24 3DP. The Consortium will accept a pre-action protocol response by email to <dgf@fewslane.co.uk>.

(19) In the event that legal proceedings become necessary in regards to this prospective claim, please note that the Fews Lane Consortium Ltd does NOT accept service by email.

(20) Should the Council continue to entertain he application after receiving this letter, it is highly likely that an application for permission for judicial review and/or an application for interim relief will be filed before the usual 14 day period response period has ended. It may be more appropriate, given the urgency of the prospective claim, to discuss the matter by telephone one day early next week.

Kind regards,

Daniel Fulton
Director

IN THE HIGH COURT OF JUSTICE **Claim No.CO/2372/2021**

QUEEN'S BENCH DIVISION
PLANNING COURT IN THE ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN
(on the application of FEWS LANE CONSORTIUM LTD) Claimant

and

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL Defendant

and

LANDBROOK HOMES LTD Interested Party

Exhibit 8
Email from Stephen Reid to Daniel Fulton
dated 27.05.2021 @ 2.50pm

[redacted]

From: Stephen Reid
Sent: 27 May 2021 14:50
To: Daniel Fulton <dgf@fewslane.co.uk>
Cc: Nigel Blazeby <Nigel.Blazeby@greatercambridgeplanning.org>
Subject: FW: 20/02453/S73 - Open email

Dear Fews Lane Consortium Limited

Please note that having regard to the email I sent to you at 15:27 on Tuesday (see below) it is not my intention to send you a full response to your Pre-Action Protocol letter (No 2) as sent by you on 21st May.

Stephen Reid
Senior Planning Lawyer
3C Shared Services – Legal Practice
Telephone: 01223 457094/07817 730893
Email: stephen.reid@3csharedservices.org

Main Office Address: South Cambridgeshire Hall, Cambourne Business Park, Cambourne, Cambridge, CB23 6EA

3C Shared Services is a strategic partnership between Cambridge City Council, Huntingdonshire District Council and South Cambridgeshire District Council

---

From: Stephen Reid
Sent: 25 May 2021 15:27
To: Daniel Fulton <dgf@fewslane.co.uk>
Cc: Nigel Blazeby <Nigel.Blazeby@greatercambridgeplanning.org>; Toby Williams <Toby.Williams@greatercambridgeplanning.org>; Lewis Tomlinson <Lewis.Tomlinson@greatercambridgeplanning.org>
Subject: FW: 20/02453/S73 - Open email

Dear Fews Lane Consortium Limited

I note that in your open email sent on 23rd May you say that your Land Registry search returned two records for registered land. One related to the property known as 2 Mitchcroft Road and the other related to land on the north west side of High Street, which is registered under title No. CB357875.

Presumably ,but please confirm ,it is your contention that notice of the planning application under 20/02453/S73 should have been served on the owner of

(i) the property known as 2 Mitchcroft Road ,and
(ii) the property under title number CB357875.

and that because notice wasn't served on such parties there is a fundamental flaw which you have suggested means the Council is positively prohibited from entertaining the application.

If that is not your contention or no longer your contention , please clarify what you believe the position to be and whether your position remains as set out in the Pre Action Protocol letter (No.2) or is now different.

I also note that in your email you say:

"…The parameter used in our search of the Land Registry is shown in the attached image…."

In these circumstances ,can I ask you to confirm that it is accepted by you that in terms of your Land Registry search the search was not limited to the red line shown on the location plan for the application under S/0277/19/FL .If that is not accepted , please clarify the reference in the "image" (included as part of your email) to a radius of "5m" .

It is the Council's position that there was no error in notice of the s.73 application not being served on the following because those properties were not part of the land shown edged red on the location plan under S/0277/19/FL

(i) on the owner of the property known as 2 Mitchcroft Road ,and
(ii) on the owner of the property under title number CB357875.

The points set out in your Pre-Action Protocol letter (No 2) are wholly without foundation or substance and I am happy to provide a Land Registry MapSearch which to my mind very clearly demonstrates that to be the case.

Stephen Reid
Senior Planning Lawyer
3C Shared Services – Legal Practice
Telephone: 01223 457094/07817 730893
Email: stephen.reid@3csharedservices.org

Main Office Address: South Cambridgeshire Hall, Cambourne Business Park, Cambourne, Cambridge, CB23 6EA

3C Shared Services is a strategic partnership between Cambridge City Council, Huntingdonshire District Council and South Cambridgeshire District Council

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From: Daniel Fulton <dgf@fewslane.co.uk>
Sent: 24 May 2021 10:26
To: Stephen Reid <Stephen.Reid@3csharedservices.org>
Subject: 20/02453/S73 - Open email

Dear Mr Reid,

This is an open email, the purpose of which is to provide information that may assist the Council with understanding the factual details related to the prospective judicial review claim set forth in Friday's pre-action protocol letter No. 2 concerning application 20/02453/S73.

The parameter used in our search of the Land Registry is shown in the attached image. This search returned two records for registered land. One related to the property known as 2 Mitchcroft Road,

the other related to land on the north west side of High Street, which is registered under title No. CB357875.

There is no title plan available for title No. CB357875.

In order to ascertain the land to which the title register refers, it was necessary to obtain the various plans referred to in the title register.

Based on our preliminary analysis of the title register and the plans referred to in the title register, a parcel of land exists which is registered to Charles Church Developments Limited.

Part of the land to which application 20/02453/S73 relates is within this parcel registered to Charles Church Developments Limited.

There is no evidence to suggest that Charles Church Developments Limited has been served with the notice required under article 13 of the DMPO 2015.

There is, however, evidence that the Council has been made aware of this fact before making a decision on the application.

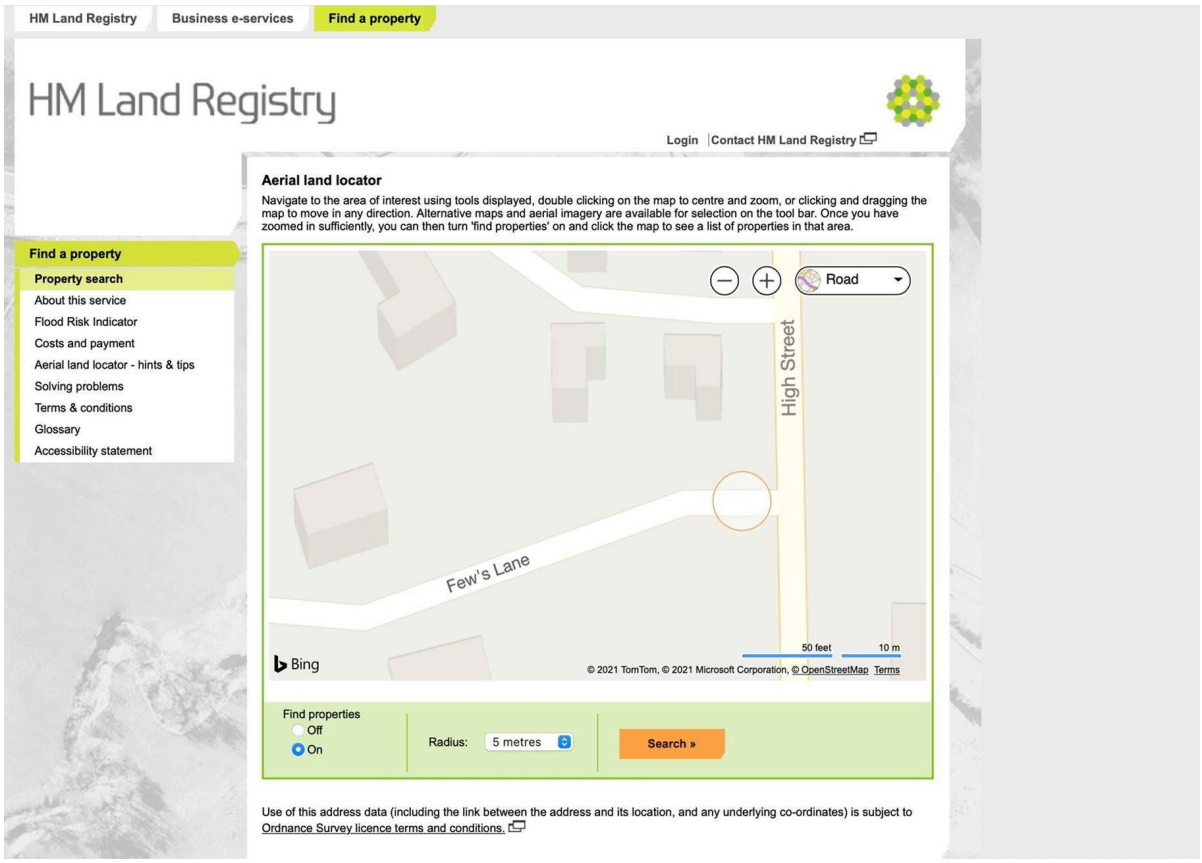
Pursuant to s. 65 and s. 327A of the 1990 Act, the Council is positively prohibited from entertaining the application in these circumstances.

Kind regards,

Daniel Fulton
Director

Fews Lane Consortium Ltd
The Elms
Fews Lane
Longstanton
Cambridge
CB24 3DP

tel. 01954 789237



IN THE HIGH COURT OF JUSTICE **Claim No.CO/2372/2021**

QUEEN'S BENCH DIVISION
PLANNING COURT IN THE ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN
(on the application of FEWS LANE CONSORTIUM LTD) Claimant

and

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL Defendant

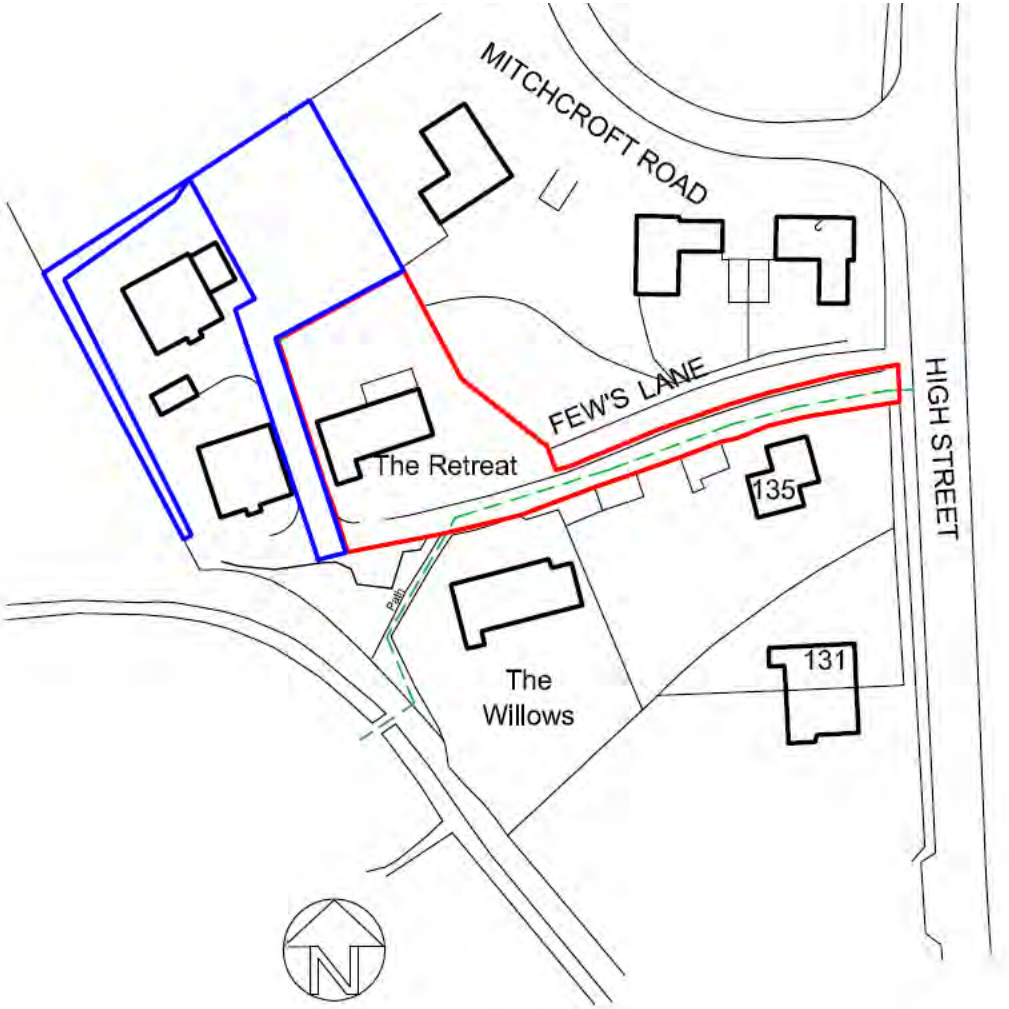
and

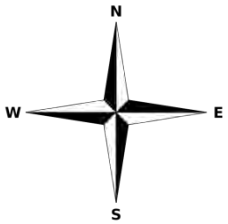
LANDBROOK HOMES LTD Interested Party

Exhibit 9
Presentation to Planning Committee 27.05.2021

20/02453/S73
The Retreat, Fews Lane, Longstanton

Site Location Plan

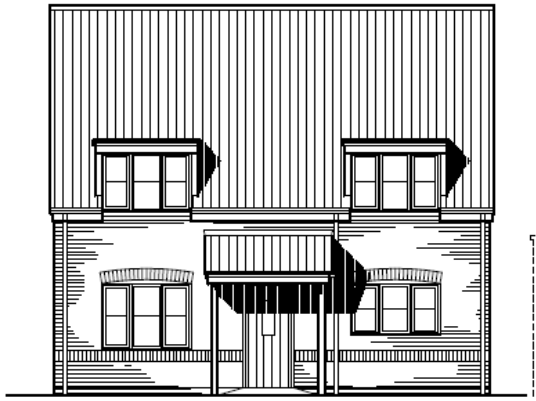




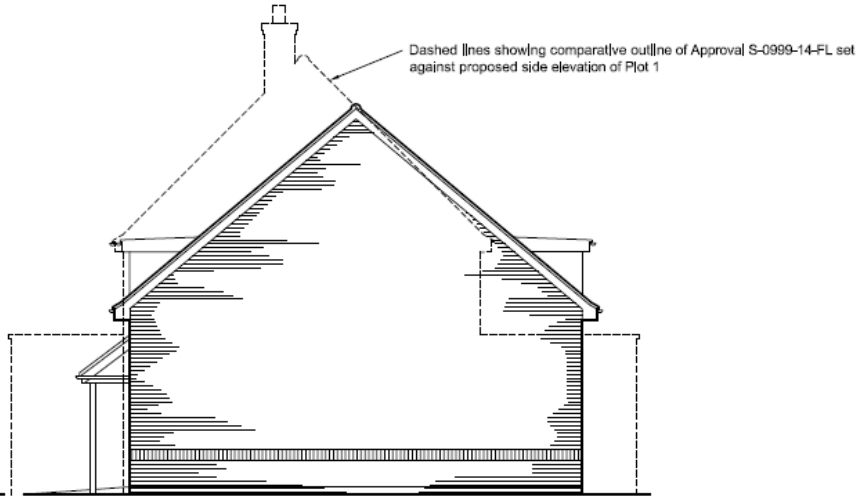
Aerial Site View

Approved site plan

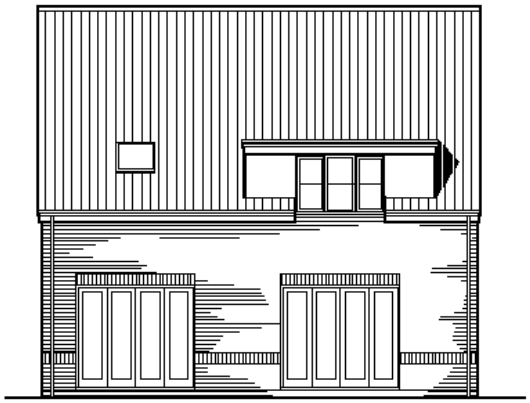
Approved elevations



FRONT [South]
ELEVATIONS 1:100 [Plots 1 & 2 Similar]



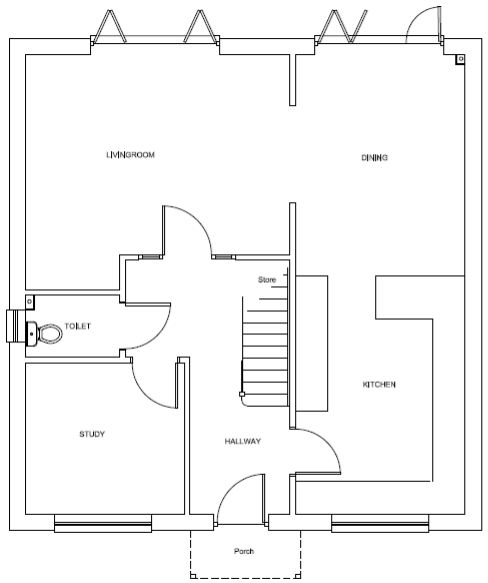
SIDE [East]



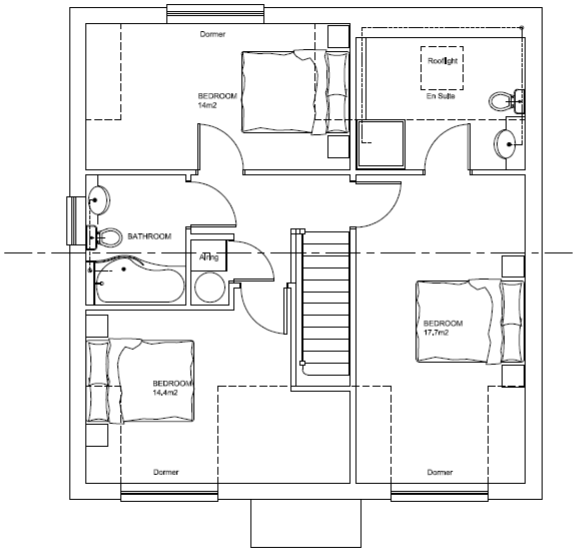
REAR [North]

SIDE [West]

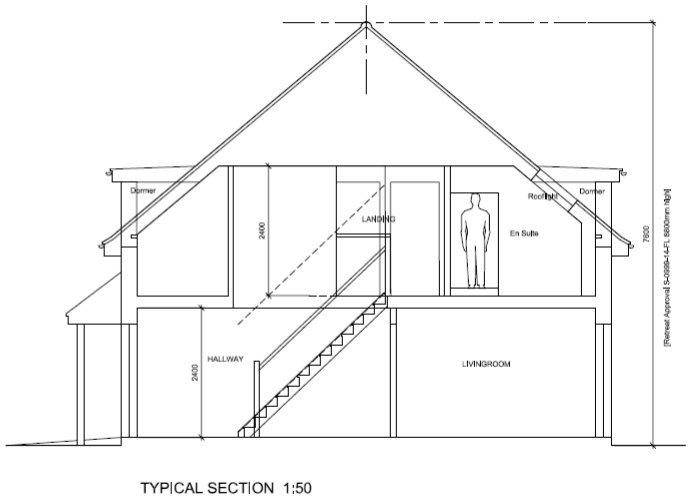
Approved floor plans/section



GROUND FLOOR PLAN 1:50 [69m2]

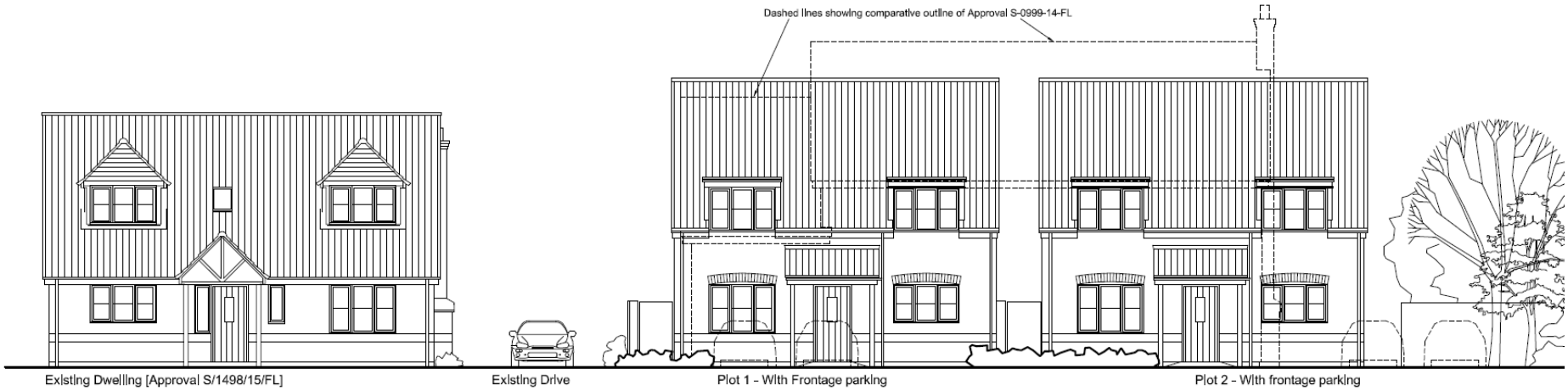


FIRST FLOOR PLAN 1:50



TYPICAL SECTION 1:50

Approved street elevation



STREET ELEVATION - Facing Few's lane 1:100

View up Fews Lane from access off High Street (135 High Street on left)

View along High Street past frontage of Fews Lane (looking north, Fews Lane on the left) - note traffic calming

View along High Street past frontage of Fews Lane (looking south with Fews Lane on the right)

View along High Street past frontage of Fews Lane (looking south with Fews Lane on the right) taken from entrance to Mitchcroft Road

Fews Lane entrance (looking towards the north)

Fews Lane entrance (looking towards the south)

Looking down Fews Lane (garage to 135 High Street and The Willows on the left)

Looking down Fews Lane (the Retreat is on the right)

Informal turning head opposite The Retreat

Access onto Fews Lane from the Public Right of Way to Home Farm

Section 73(2) of the Town and Country Planning Act 1990 states that when considering an application submitted under section 73:

"the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and—

(a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and

(b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application."

The current wording of condition 7 of planning permission S/0277/19/FL is:

No demolition or construction works shall commence on site until a traffic management plan has been agreed with the Local Planning Authority in consultation with the Highway Authority. The principle areas of concern that should be addressed are:
(i) Movements and control of muck away lorries (all loading and unloading shall be undertaken off the adopted highway)
(ii) Contractor parking shall be within the curtilage of the site and not on the street.
(iii) Movements and control of all deliveries (all loading and unloading shall be
undertaken off the adopted public highway.
(iv) Control of dust, mud and debris, in relationship to the functioning of the adopted public highway.
The reason given for the imposition of this condition was "In the interests of highway safety."

The application seeks to amend the wording of condition 7 to:

The development hereby permitted shall be carried out in accordance with the Traffic Management Plan prepared by SLR Consulting, Version Final_1 and dated December 2019.

The development hereby permitted shall be carried out in accordance with the Traffic Management Plan prepared by SLR Consulting, Version Final_1 and dated December 2019. Notwithstanding the detail contained with the Traffic Management Plan in relation to parking of delivery vehicles, no delivery vehicles during the construction phase will park on any streets within the village of Longstanton.

Plan taken from the proposed Traffic Management Plan

Members will recall considering this application at the 13 January 2021 Planning Committee meeting. The Committee resolved to approve the application subject to:

- The revision of paragraph 3.2.4 of the Traffic Management Plan to state, during the construction stage, delivery vehicles shall not park on any street within the village of Longstanton.

- Addition of an Informative urging the establishment of a liaison mechanism between residents, the Site Manager and Longstanton Parish Council to monitor compliance with the Traffic Management Plan and to resolve any disputes; and

- The Conditions and Informatives set out in the report from the Joint Director of Planning and Economic Development.

Update

Full update will be reported verbally but to summarise:

- No material change of policy or circumstances which might require a re-assessment of the other conditions or the development as a whole
- The issue is whether pedestrian visibility splays at the end of Fews Lane should be included in the red line plan of S/0277/19/FL
- The Local Highway Authority are satisfied the visibility splays are within Highway land.
- FLC argues these splays must be within the red line and therefore invalidates the application
- No case law to support FLC's position. Officers advise no underlying legal flaw based on legal and external counsel advice.

Recommendation

Officer recommendation is approval subject to:

- The revision of paragraph 3.2.4 of the Traffic Management Plan to state, during the construction stage, delivery vehicles shall not park on any street within the village of Longstanton.

- Addition of an Informative urging the establishment of a liaison mechanism between residents, the Site Manager and Longstanton Parish Council to monitor compliance with the Traffic Management Plan and to resolve any disputes; and

- The Conditions and Informatives set out in the report from the Joint Director of Planning and Economic Development.

IN THE HIGH COURT OF JUSTICE **Claim No.CO/2372/2021**

QUEEN'S BENCH DIVISION
PLANNING COURT IN THE ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN
(on the application of FEWS LANE CONSORTIUM LTD) Claimant

and

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL Defendant

and

LANDBROOK HOMES LTD Interested Party

Exhibit 10
Email from Daniel Fulton to Stephen Reid
dated 21.06.2021 @ 4.57pm

[redacted]

[redacted]

From: Daniel Fulton <dgf@fewslane.co.uk>
Sent: 21 June 2021 16:57
To: Stephen Reid <Stephen.Reid@3csharedservices.org>
Cc: Kelly Stephen <Stephen.Kelly@greatercambridgeplanning.org>; Sharon Brown <Sharon.Brown@greatercambridgeplanning.org>; Toby Williams <Toby.Williams@greatercambridgeplanning.org>; Lewis Tomlinson <Lewis.Tomlinson@greatercambridgeplanning.org>
Subject: Pre-action protocol: 20/02453/S73 (Fews Lane, Longstanton)

Dear Mr Reid,

Please find attached the Consortium's pre-action protocol letter concerning planning application 20/02453/S73.

Kind regards,

Daniel Fulton
Director

Fews Lane Consortium Ltd
The Elms
Fews Lane
Longstanton
Cambridge
CB24 3DP

tel. 01954 789237

Fews
Lane
Consortium
Ltd

Daniel Fulton
DIRECTOR

T: 01954 789237
E: dgf@fewslane.co.uk

The Elms
Fews Lane
Longstanton
Cambridge
CB24 3DP

21 June 2021

South Cambridgeshire District Council
South Cambridgeshire Hall
Cambourne Business Park
Cambourne
Cambridge CB23 6EA

Dear Sir/Madam,

Judicial review pre-action protocol letter: Planning application 20/02453/S73

(1) South Cambridgeshire District Council (the "**Council**"), South Cambridgeshire Hall, Cambourne Business Park, Cambourne, Cambridge CB23 6EA, is the prospective defendant in a claim for judicial review. In light of the Council's current remote working arrangements, this correspondence has been sent to the Council by email only.

(2) The prospective claimant is the Fews Lane Consortium Ltd (the "**Consortium**"), The Elms, Fews Lane, Longstanton, Cambridge CB24 3DP. The Consortium represents the interests of local residents in regards to issues of planning and development.

(3) The prospective claimant considers the applicant for planning permission, Landbrook Homes Ltd, to be an interested party. A copy of this letter has been sent to Landbrook Homes Ltd at 36a Church Street, Willingham, Cambridge CB24 5HT.

(4) The prospective claim concerns the Council's decision issued on 27 May 2021 in regards to planning application 20/02453/S73, which proposes the demolition of the existing bungalow and the erection of two dwellinghouses at The Retreat, Fews Lane, Longstanton, Cambridge CB24 3DP.

(5) The decision is to be challenged on the following grounds:

Ground 1: The Defendant misdirected itself in fact in stating in the officer's report that, "1.5m pedestrian visibility splays are available within the adopted highway at the junction of Fews Lane with the High Street."

Ground 2: Contrary to section 100D(1) of the Local Government Act 1972, the Defendant failed to identify the background papers relied upon in the officer's report and failed to make a copy of each background paper available for inspection.

Ground 3: The Defendant either (A) failed to take into consideration its decision on an application for the erection of additional dwellings at the same site from 2013, OR, even if the Defendant did take its 2013 decision into account, (B) it failed to even briefly state its reasons for reaching a different conclusion on matters of principal importance in the decision, in particular, in regards to highway safety conditions.

Ground 4: The Defendant misdirected itself in its officer's report in stating that planning permission S/0277/19/FL (A) was capable of implementation and (B) represented a fallback position.

Ground 5: The Defendant misdirected itself as to the proper approach to the determination of applications submitted under s. 73 of the Town and Country Planning Act 1990.

Ground 6: The Defendant ignored a material consideration in failing to consider the key material policy of the development plan, policy H/16, which concerns the erection of additional dwellings within residential gardens.

Legal Framework

Misdirection in fact as grounds for judicial review

(6) In *Smith v Inner London Education Authority* [1978] 1 All ER 411, Lord Denning said (at 415):

> "It is clear that, if the education authority or the Secretary of State have exceeded their powers or misused them, the courts can say: 'Stop'. Likewise, if they have misdirected themselves in fact or in law."

(7) Likewise, in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, Lord Wilberforce said (at 1047F):

> "In many statutes a minister or other authority is given a discretionary power and in these cases the court's power to review any exercise of the discretion, though still real, is limited. In these cases it is said that the courts cannot substitute their opinion for that of the minister: they can interfere on such grounds as that the minister has acted right outside his powers or outside the purpose of the Act, or unfairly, or upon an incorrect basis of fact."

(8) In *Oxton Farms v Selby District Council* [1997] EWCA Civ 4004, [2017] PTSR 1103, Judge LJ said:

> "An application for judicial review based on criticisms on the planning Officers' Report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken."

Duty to list and provide background papers for inspection

(9) Section 100B(1) of the Local Government Act 1972 (the "**1972 Act**") provides that:

> "Copies of the agenda for a meeting of a principal council and […] copies of any report for the meeting shall be open to inspection by members of the public".

(10) Section 100D(1) of the 1972 Act provides that:

> "if and so long as copies of the whole or part of a report for a meeting of a principal council are required by section 100B(1) or 100C(1) above to be open to inspection by members of the public—
> (a) those copies shall each include a copy of a list, compiled by the proper officer, of the background papers for the report or the part of the report, and
> (b) at least one copy of each of the documents included in that list shall also be open to inspection at the offices of the council."

(11) Section 100D(4) of the 1972 Act provides that:

"For the purposes of this section the background papers for a report are those documents relating to the subject matter of the report which—
(c) disclose any facts or matters on which, in the opinion of the proper officer, the report or an important part of the report is based, and
(d) have, in his opinion, been relied on to a material extent in preparing the report, but do not include any published works."

(12) Section 100E(1) of the 1972 Act provides that:

"Sections 100A to 100D above shall apply in relation to a committee or sub-committee of a principal council as they apply in relation to a principal council."

(13) In *R (Kinsey) v Lewisham London Borough Council* [2021] EWHC 1286 (Admin) at [101] - [103], Lang J states:

"Access to reports and background papers not only allow the public to be informed, but to participate by making written representations to councillors and officers in advance of the meeting and also assisting the preparation of oral representations. A breach of these provisions is significant: see *R (Joicey) v Northumberland County Council* [2014] EWHC 3657 (Admin), [2015] PTSR 622 at [47] per Cranston J.:

'The very purpose of a legal obligation conferring a right to know is to put members of the public in a position where they can make sensible contributions to democratic decision-making.'

This decision was recently affirmed by Dove J in *R (Holborn Studios Limited) v London Borough of Hackney (No2)* [2020] EWHC 1509 (Admin), [2021] JPL 17 at [71].

The mere fact of a failure to disclose information strictly in accordance with the duties under sections 100B and 100D will not by itself necessarily require the quashing of any decision made at a relevant meeting. It is necessary to consider the significance of the failure, having regard to the purpose of the duty: see *R (McCann) v Bridgend County Borough Council* [2014] EWHC 4335 (Admin) per HHJ Keyser QC at [27]."

Adequate reasoning

(14) In *Padfield v Minister of Agriculture, Fisheries and Food* [1968] A.C. 997 at 1061-1062, Lord Upjohn said that if decision maker "does not give any reason for his decision it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion and order a prerogative writ to issue accordingly."

(15) In *R (Oakley) v South Cambridgeshire District Council* [2017] EWCA Civ 71, [2017] 1 WLR 3765 at [46], Elias LJ states:

"there do not appear to be any decisions (apart from Jay J in this case) where a court has held that reasons need not be given even though the reasoning is otherwise opaque".

The Court of Appeal then went on to reverse the decision of Jay J referenced above.

(16) In *R v Mendip District Council ex p Fabre* (2000) 80 P. & C.R. 500 (at 510), Sullivan J, as he then was, discussed a situation in which a common law obligation to give reasons would arise:

"An obvious example of such a circumstance is, in principle, where a local planning authority has changed its mind and decided to grant planning permission for a development which it has previously refused … I say 'in principle' because it may be plain from all the surrounding circumstances why the council has changed its mind, as was the case in *ex p. Chaplin* (per Pill LJ at p. 53). There may be cases where reasons should be set out in a minute. … Equally, there may be cases where that would be unnecessary in the light of the factual background. I am satisfied that this case falls into the latter category … If there has been an earlier refusal, as recommended by

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

(17) *South Buckinghamshire District Council v Porter (No. 2)* [2004] UKHL 33, [2004] 1 WLR 1953 at [36]:

"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need only refer to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospect of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

Interpretation of Section 73 of the Town and Country Planning Act 1990

(18) Section 73 of the Town and Country Planning Act 1990 (the "**1990 Act**") provides that:

"(1) This section applies ... to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.

(2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and -

(a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted,

(b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application."

(19) In *R (Stefanou) v Westminster City Council* [2017] EWHC 908 (Admin) at [36], Gilbart J states:

"It is common ground that on a s 73 application the LPA was obliged to comply with s 70(2) *TCPA 1990* and s 38(6) of *PCPA 2004*. Thus, it had to have regard to the development plan and any material considerations (s 70(2) *TCPA*) and then determine the application in accordance with the development plan unless material considerations indicated otherwise (s 38(6) *PCPA*). Reference was made to *Pye v Sec of State for the Envt* [1998] 3 PLR 72, approved in *Powergen UK PLC v Leicester City Council* [2000] JPL 1037 [2001] 81 P &CR 47 (CA) per Schiemann LJ."

(20) In *Stefanou* at [88], Gilbart J further states that:

What is also quite clear, and I so find, is that the WCC officers had approached this application in an entirely inappropriate mindset. The email of 9th February 2016 that

'There is a problem I am afraid……
Your proposals now include the addition of a new storey to the link. These are changes that are much more significant than non-material or other minor amendments.

Therefore I am afraid that you need to apply for the whole scheme, as revised. Applications for planning permission and listed building consent are required.

Clearly, in our assessment we will only focus on the revised elements, because the rest has consent…'

contains a very straightforward error of law. As *Pye* and *Powergen* make clear, the whole scheme now applied for had to be considered in accordance with the relevant tests."

Remedies sought & ADR

(21) The Consortium intends to seek an order quashing the Council's decision, a declaration that the Council erred in law, and an order that the Council pay the Consortium's costs in the claim.

(22) Because a quashing order is necessary, the Consortium does not feel that any form of alternate dispute resolution would be appropriate for this claim. Nevertheless, the Consortium hopes that the Council will recognise the serious legal defects in its decision and agree to a consent order quashing the Council's decision.

(23) The various legal errors committed by the Council go to the heart of Council's decision making process. In no way could it be considered likely that the same decision (particularly in regards to highway safety conditions) would have been reached if not for the legal errors alleged. Accordingly, the court can not rightly refuse to grant permission for judicial review or refuse to grant relief under s. 31 of the Senior Courts Act 1981.

(24) The Consortium intends to issue proceedings as an Aarhus Convention claim pursuant to Parts 45.41 – 45.45 of the Civil Procedure Rules because the claim challenges the legality of a decision of a body exercising a public function which is within the scope of Article 9(3) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters agreed at Aarhus, Denmark on 25 June 1998 (the Aarhus Convention).

(25) The Consortium does not envisage that it will be necessary to propose any variation of the standard limits on recoverable costs as stated in Parts 45.43(2)(b) and 45.43(3) of the Civil Procedure Rules.

(26) Should it become necessary to issue a claim, a complete statement of the Consortium's financial resources and a statement of financial support received will be provided at the earliest opportunity and, in any event, will be served with the claim form.

(27) The Consortium's address for the response and service of documents is: Fews Lane Consortium Ltd, The Elms, Fews Lane, Longstanton, Cambridge CB24 3DP. The Consortium will accept a pre-action protocol response by email to <dgf@fewslane.co.uk>.

(28) In the event that legal proceedings become necessary in regards to this prospective claim, please note that the Fews Lane Consortium Ltd does NOT accept service by email.

(29) The Consortium would like to propose a reply date of 5 July 2021, which is 14 days from the date of this letter. As a claim in this matter must be issued by 8 July 2021, the Consortium will not be able to agree to any extensions of time in regards to the pre-action protocol.

Kind regards,

Daniel Fulton
Director

IN THE HIGH COURT OF JUSTICE **Claim No.CO/2372/2021**

QUEEN'S BENCH DIVISION
PLANNING COURT IN THE ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN
(on the application of FEWS LANE CONSORTIUM LTD) Claimant

and

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL Defendant

and

LANDBROOK HOMES LTD Interested Party

Exhibit 11
Email from Stephen Reid to Daniel Fulton
dated 05.07.2021 @ 4.59pm

[redacted]

[redacted]

From: Stephen Reid
Sent: 05 July 2021 16:59
To: Daniel Fulton <dgf@fewslane.co.uk>
Cc: Kelly Stephen <Stephen.Kelly@greatercambridgeplanning.org>; Sharon Brown <Sharon.Brown@greatercambridgeplanning.org>; Toby Williams <Toby.Williams@greatercambridgeplanning.org>; Lewis Tomlinson <Lewis.Tomlinson@greatercambridgeplanning.org>; Rory McKenna <Rory.Mckenna@3csharedservices.org>
Subject: FW: Fews Lane S73 PAP response July5thCl
Importance: High

Dear Fews Lane Consortium Limited

Please see attached which I am instructed to send to you on behalf of the Council

Please note it is being sent to you as an email only in the light of your confirmation that an email copy would be accepted.

Please acknowledge receipt and if you have any queries please let me know.

Stephen Reid
Senior Planning Lawyer
3C Shared Services – Legal Practice
Telephone: 01223 457094/07817 730893
Email: stephen.reid@3csharedservices.org

Main Office Address: South Cambridgeshire Hall, Cambourne Business Park, Cambourne, Cambridge, CB23 6EA

3C Shared Services is a strategic partnership between Cambridge City Council, Huntingdonshire District Council and South Cambridgeshire District Council

From: Stephen Reid <Stephen.Reid@3csharedservices.org>
Sent: 05 July 2021 16:57
To: Stephen Reid <Stephen.Reid@3csharedservices.org>

Subject: Fews Lane S73 PAP response July5thCl

5th July 2021

To :

Fews Lane Consortium Limited
By email only

Dear Fews Lane Consortium Limited

Response to judicial review pre-action protocol letter:
Planning application 20/02453/S73

This letter is the Council's Response to a Letter Before Claim dated 21 June 2021 ("PAP letter"). It follows the template for a Response to a Letter Before Claim contained in Annex B to the Pre-action protocol for judicial review under the Civil Procedure Rules.

The Prospective Claimant ("the Claimant")

The Fews Lane Consortium Ltd.
The Elms, Fews Lane,
Longstanton, CB24 3DP

The Prospective Defendant ("the Council")

South Cambridgeshire District Council
South Cambridgeshire Hall
Cambourne Business Park
Cambourne
Cambridge, CB23 6EA

Reference details

This matter is being handled by Stephen Reid of 3C Shared Services Legal Practice, who can be contacted via email at Stephen.Reid@3csharedservices.org

The details of the matter being challenged

The decision proposed to be challenged is the Council's decision of 27th May 2021 to approve a planning application (Ref: 20/02453/S73) for:

'Variation of condition 7 (Traffic Management plan) pursuant to planning permission S/0277/19/FL to reflect the proposals in the Traffic Management Plan to substitute the current wording in Condition 7 with "The development hereby permitted shall be carried out in accordance with the Traffic Management Plan prepared by SLR Consulting, Version Final_1 and dated December 2019 as amended by planning committee on the 26th May 2021 in relation to paragraph 3.2.4" (Re-submission of 20/01547/S73)'

at The Retreat, Fews Lane ,Long Stanton, Cambridge, CB24 3DP.

Response to the proposed claim

1 The PAP letter does not comply with the template for a Letter before claim under the Pre-action protocol for judicial review (Annex A). Whilst the PAP letter does identify the Grounds on which you propose to challenge the Council's decision, it does not go on to provide any detail or explain how each Ground is said to render the Council's decision unlawful (see Section 7 of the Template under Annex A, and the requirement to explain why it is contended that the decision is wrong).

2 This is a requirement you are clearly well aware of, as you have complied with it in numerous PAP letters sent to the Council since 2019.

3 Notwithstanding this failure, the Council has sought below to respond to the Grounds as it understands they will be argued. Insofar as the Grounds are argued differently or additional Grounds are raised in any claim, the Council reserves the right to refer to the failure to comply with the Pre-action protocol in relation to costs.

4 The proposed claim will be contested in full, should it be served on the Council.

Background

5 On 9 May 2019, the Council granted planning permission for the demolition of the existing bungalow and construction of two dwellings including car parking and landscaping at the Retreat, Fews Lane, Long Stanton, Cambridge, CB24 3DP (S/0277/19/FL).

6 Condition 7 of the 2019 consent was a pre-commencement condition requiring the submission of a traffic management plan, to be agreed with the Council, including principal areas of concern.

7 There was no challenge to the grant of the 2019 consent and the 3 year commencement period for that consent has not expired (Condition 1).

8 By an application under s.73 of the TCPA 1990 (as amended), the applicant sought a variation of Condition 7. In essence, the variation application sought to amend the wording of the condition from a pre-commencement condition to a condition requiring compliance with an approved Traffic Management Plan (prepared by SLR Consulting and dated December 2019).

9 The application was considered at 3 Planning Committee meetings.

10 In January 2021, the Committee resolved to approve the application subject to:

- The revision of one paragraph of the Traffic Management Plan so as to prevent delivery vehicles from parking on any street within the village of Longstanton;

- The addition of an informative urging the applicant to establish a liaison mechanism between residents, the site manager, and Longstanton Parish Council, to monitor compliance with the Traffic Management Plan and to resolve any disputes.

- The Conditions and Informatives set out in the Officer Report which had recommended approval.

11 The Officer Report recorded that the Claimant had made representations in relation to the application on 10 July 2020, 27 July 2020, 20 August 2020, 23 August 2020, 3 September 2020, 8 September 2020, and 28 September 2020. These were summarised in the Officer Report (para. 24).

12 Following the January 2021 resolution, the consent was not issued. That was because, although the application had been advertised as affecting a PROW, officers mistakenly gave advice at the meeting that such advertisement was not required. A late representation had also been received by a resident the evening before the January meeting which had not been passed to officers and reported to Members.

13 In April 2021, the application was reported back to Committee with updates responding to the above matters. In addition, a further update was required as a result of a late representation from the Claimant dated 1 April 2021 raising non-compliance with Policy NH/6 (Green Infrastructure). This was responded to in the further update, with no change to the recommendation of approval.

14 At the April 2021 Committee, you raised yet further concerns that your representations had not been fully assessed within the Officer Reports. In response, the Committee agreed to defer consideration of the application so that your representations could be examined and addressed, as necessary.

15 A full update was provided for the May 2021 Committee meeting. This outlined the events above.

16 The Update also summarised the Claimant's representations of 1 March 2021 and 14 March 2021. It responded to those representations in full, quoting a detailed passage from the original Officer Report which resulted in the 2019 consent, in which the planning merits of the suggested highway improvements to Fews Lane, the extent of the red line and visibility splays were all considered.

17 On these points, the Update concluded that (paras. 8-10, in summary):

- Highway safety issues relating to Fews Lane had been robustly considered at appeal level.
- Officers had considered the cumulative impact of the total amount of properties along Fews Lane.
- The conditions proposed by the Claimant (on upgrading Fews Lane and visibility splays) were not imposed on the 2019 consent.
- Nor had the Highway Authority requested visibility splay conditions on the current s.73 application.
- Members and officers were not bound by the advice of the Highway Authority.
- The ownership of Fews Lane was immaterial to the necessity of upgrades to it.
- In Officers' view, it was not necessary to apply additional conditions as part of the s.73 application to upgrade Fews Lane or maintain pedestrian visibility splays.
- The splays required are contained within the adopted highway.
- Material circumstances have not altered to suggest that such conditions are now necessary.
- Since the 2019 consent did not impose such conditions, to impose them now would not be reasonable for a s.73 application which seeks to amend the wording of the Traffic Management Plan, particularly given that the 2019 consent could be implemented without complying with those conditions.

18 The Update also recorded that, since the April Committee, the Claimant had sent 2 pre-action protocol letters to the Council, one relating to this application, and one relating to an application for the adjacent site to the rear. These argued that the Council had no jurisdiction to entertain this application because (in this case) the red line area on the location plan failed to include all the land necessary to carry out the proposed development contrary to Article 7(l) of the DMPO 2015, and specifically failed to include the land required for visibility splays.

19 The Update responded to these points by noting that pursuant to Article 7(l) of the 2015 Order, no location plan is required for a s.73 application. The 2019 application and Officer Report considered the representations concerning the adequacy of the access to the plot, the proposed improvements including the widening of the Fews Lane access, visibility splays, and the extent of the red line. The grant of consent in 2019 had not been challenged. The Council did not agree that it had no lawful authority to entertain the s.73 application pursuant to s.327A of the 1990 Act and Article 7 of the 2015 Order (para. 12).

20 An Officer Presentation was produced for the May 2021 Committee. This also responded to the points raised in the pre-action letter, noting that the Council had taken external legal advice from Counsel on the points. As relevant, Counsel's view was that: (1) granting planning permission for development which relied on adopted highway land outside the red line site boundary as part of the visibility splays was not in breach of the requirements of the 2015 Order; (2) Provided that the land on which operational development would take place was within the red line boundary, and the remaining land is adopted highway, the requirements of the 2015 Order would be complied with. A copy of a Counsel's advice and the Council's cover email were contained in the background papers accompanying the Officer Report (Doc. 2) and in any event had been sent to the Claimant albeit in relation to a different site .

21 Finally, the Update recorded that, notwithstanding that neither the 2019 consent nor the s.73 application included a site location plan which extended to the adopted highway and included visibility splays, 1.5m pedestrian visibility splays are available within the adopted highway at the junction of Fews Lane and the High Street, and the Highway Authority has a duty to maintain the highway, which includes the verge in this case (para. 13).

22 The Updates from April 2021 and the original January 2021 Officer Report were enclosed with the May 2021 Update. The recommendation to approve as per the January 2021 resolution remained the same. Copies of the correspondence relating to this application between the Claimant and Council was included, with an index (109 pages) albeit that some pages were redacted because of correspondence which had been marked "without prejudice".

23 It will be apparent from the above that throughout the consideration of this application, you have made many representations raising a wide range of legal and factual issues. Officers have sought to ensure that your points have been considered and put before the Committee.

24 Despite this, following the resolution of the Committee to approve the application and the Decision Notice dated 27 May 2021, you now propose to challenge that decision on 6 Grounds. It would appear that Grounds 2, 3, 4, and 6 have not been raised by you before. It is felt that these are matters which could have been raised in response to the publication of the Update to the Officer Report in May 2021, such that they could have been considered at that stage.

25 Should the claim be issued, the Council reserves the right to refer to these matters in relation to the merits and costs.

Ground 1: The Defendant misdirected itself in fact in stating in the officer's report that, "1.5m pedestrian visibility splays are available within the adopted highway at the junction of Fews Lane with the High Street."

26 This Ground is hopeless. The leading case on mistake of fact is *E v SSHD* [2004] QB 1044 in which the Court of Appeal set out the ordinary requirements for a finding of unfairness based on a mistake of fact (para. 66 per Carnwath LJ).

27 First, there must have been a mistake as to an existing fact. The Council disputes your claim that there has been a mistake on the facts as to the available visibility splays. 1.5m pedestrian visibility splays are available within the adopted highway at the junction of Fews Lane with the High Street.

28 Secondly, the fact must have been established in the sense that it is uncontentious and objectively verifiable. It is the Council's position that you have not demonstrated, let alone established, that the Council's view - that 1.5m visibility splays are available - is wrong.

29 Thirdly, it is not being suggested that the Claimant was responsible for the mistake but if the objectively verifiable evidence of the extent of the visibility splays were available, the Council would reasonably have expected this to have been confirmed by you and evidence provided by you as to the extent of the visibility splays said to be available .

30 Fourthly, the mistake must have played a material (not necessarily decisive) part in the decision.

Ground 2: Contrary to section 100D(1) of the Local Government Act 1972, the Defendant failed to identify the background papers relied upon in the officer's report and failed to make a copy of each background paper available for inspection.

31 This Ground is similarly without merit or substance. It fails on the facts. The Officer Report was careful and detailed, and included a series of updates which comprehensively set out for the Committee, and members of the public, the issues relating to the application.

32 By reference to s.100D(4) of the 1972 Act, there were, in any event, no background papers to the Officer Report which were relied upon which were not already in the public domain. Specifically, the May 2021 Update included all previous Updates and the January 2021 Officer Report. It also enclosed an Index with all correspondence between the Claimant and the Council on this application (Agenda Item 5 to the May 2021 Meeting). It is not clear what you say this omitted or what you say was not available and prevented you from responding.

33 More generally, you do not identify which background papers were omitted and in what way they prevented you from participating in the consideration of the application. By reference to the background above, you clearly had a full opportunity to engage in the planning process on this application. Even if there were a failure to comply with the provisions under s.100B and s.100D of the 1972 Act – which is denied - you provide no reasons whatsoever as to the significance of any such failure, which would be relevant to relief (*McCann*).

Ground 3: The Defendant either (A) failed to take into consideration its decision on an application for the erection of additional dwellings at the same site from 2013, OR, even if the Defendant did take its 2013 decision into account, (B) it failed to even briefly state its

reasons for reaching a different conclusion on matters of principal importance in the decision, in particular, in regards to highway safety conditions.

34 You have not provided the basis on which it is claimed that the failure to take account of the Council's decision in 2013 for the "same site" (see below) renders this decision wrong.

35 It is assumed that the Claimant is referring to application Ref: S/2561/12/OL and Condition 10 of that permission which required 2m x 2m visibility splays from and along the highway boundary. However, the site for S/2561/12/OL is not the same site as that relating to the application which you propose to challenge 20/02453/S73 (i.e. S/0277/19/FL). There was therefore no requirement for the Planning Committee to consider S/2561/12/OL which is 8 years old, was not directly relevant to the decision before the Council, and which has in any event been superseded by more recent planning permissions.

36 As referred to above, the Council set out in detail its reasoning for the conclusion that highway safety would not be compromised by reference to the Officer Report for the 2019 consent (S/0277/19/FL). Extracts are quoted in paragraph 7 of the May 2021 Officer Report. This included references to relevant appeal decisions and changes to the nature of the highway through Longstanton.

37 In addition, Members of the Planning Committee were presented with photographs of Fews Lane and of its junction onto Longstanton High Street as part of the presentation made by Officers for the May 2021 meeting. It was therefore not necessary to consider S/2561/12/OL or state reasons for reaching a different conclusion regarding the necessity of highway safety related planning conditions.

38 Members of the Planning Committee had all the necessary and relevant information before them to make an informed decision regarding the highway safety implications of their decision, including their powers to impose additional conditions if they thought it necessary to do so.

39 Even if the 2013 decision were relevant – which it was not – the reasons for the decision on this application were more than adequate, enabling the parties to understand why permission was granted and what conclusion was reached on the principal important controversial issue of highway safety. The reasons need refer only to the main issues, not to every material consideration (*South Bucks v Porter*).

Ground 4: The Defendant misdirected itself in its officer's report in stating that planning permission S/0277/19/FL (A) was capable of implementation and (B) represented a fallback position.

40 You have provided no explanation as to why you say that the 2019 consent was incapable of implementation and could not constitute a fall-back position.

41 The 2019 consent (S/0277/19/FL) was granted on 9 May 2019 with a three-year time period for implementation (Condition 1). The 3 year period has not expired.

42 In any event, the availability of a fall-back position was but one strand of the reasoning supporting Officers' view that there were no highways safety concerns, and that additional conditions were not necessary (para. 17 above). Even if reference to the 2019 consent were removed from that reasoning, there remains perfectly adequate support for the conclusion that there was no need to impose further highway safety conditions.

Ground 5: The Defendant misdirected itself as to the proper approach to the determination of applications submitted under s. 73 of the Town and Country Planning Act 1990.

43 This Ground fails on the facts. The approach to this s.73 application was perfectly proper. The officer presentation which was read to the Planning Committee meeting in May 2021 specifically advised members that:

'The effect of granting a S73 application is that a new planning permission is given (which is con[s]trained by the original time limit for implementation). Otherwise, the question of what conditions, if any, are necessary to make the proposed development acceptable in planning terms is for the members of planning committee. Members of the committee are free to attach new conditions not previously attached if those new conditions are necessary to make the proposed development acceptable in planning terms and meet the other six tests of planning conditions and are legal in all other respects.

Officers can advise members that, as a fresh permission will be issued, since S/0277/19/FL was approved, there has been no material change of policy or other circumstances which might require a re-assessment of other conditions or, indeed a re-assessment of the development as a whole. Whilst the officer's report covers re-assessment of conditions, officer's should add that we are satisfied that no wider reconsideration of the principle of development is justified.'

44 The Officer Report for the January 2021 meeting (to which updates were made for the April and May meetings) took the same approach, that the principle of development had already been established through the grant of the 2019 consent and that officers were satisfied that there had been no material change in policy or the surrounding context that required re-assessment of any other conditions attached to the approved development (para. 33).

45 The approach was not solely focussed on the Condition sought to be varied by the application, but properly considered the principle of development against the backdrop of the 2019 consent and the absence of any material change in policy since then. This was a proper approach and there was no misdirection.

Ground 6: The Defendant ignored a material consideration in failing to consider the key material policy of the development plan, policy H/16, which concerns the erection of additional dwellings within residential gardens.

46 The lack of merit in this Ground is revealed by the fact that it is raised now, for the first time, in the PAP letter. Despite the many representations made by the Claimant throughout the consideration of this application – including, for example, the late representation for the April 2021 meeting, which raised Policy NH/6 - none of those representations argued that the Council had failed to consider Policy H/16, which you now claim is '*the key material policy*' of the Development Plan relating to this application.

47 The Officer Report for this application does not expressly reference or assess policy H/16 because it was not a principal consideration in assessing the merits of the proposal. The s.73 application was for the variation of a traffic management plan condition associated with the 2019 consent. Policy H/16 refers to a series of development principles concerning the development of residential gardens. The approved plans are the same between the 2019 consent and this s.73 application. No change to the design, scale or footprint of the scheme or the character of the area was proposed as was confirmed in the Update for the May 2021 Committee (para 11):

'It is to be noted that the current S73 application only seeks to amend the wording of the Traffic Management Plan condition and does not seek to change the design or layout of the approved dwellings. There also has been no material change in the surrounding context or planning policy to warrant forming an alternative view.'

48 The Officer Report for the January 2021 Meeting also explained that the principle of development had been established (para. 33):

'The principle of development of the dwellings on the site has already been established through the granting of the original application (S/0277/19/FL). Officers are satisfied that there has been no material change in policy or the surrounding context that requires a re-assessment of any other conditions attached to the approved development. The assessment for this application focuses on the proposed variation of condition 7, including consideration of the reasons for the condition and the acceptability of the proposed changes to the condition that are being sought. This centres upon the assessment of the acceptability of the submitted Traffic Management Plan having regard to highway safety.'

49 No third-party representations were made specifically in relation to policy H/16. In those circumstances, it was not necessary specifically to examine the merits of the s.73 application against policy H/16 given the principle of development established by the 2019 consent and the details of the S73 application.

Grounds raised on 30 June 2021

50 Most recently, by email dated 30 June 2021, you have raised 2 further Grounds which you propose will form part of your claim. The time you have provided for the Council to respond to these Grounds is woefully inadequate. Nonetheless, our initial consideration of them indicates that they are devoid of merit.

51 First, you claim that the Council has breached a legitimate expectation by failing to consider representations made by the Claimant on 20 April 2021. This is both vague and weak. The table which you refer to was attached to the email and contained the planning history of the site. This was sent to the Council for the purposes of a meeting arranged with the Director of Planning Stephen Kelly, Toby Williams and the Council's Solicitor Stephen Reid. It was not put forward as a formal representation to the s.73 application, but plainly as a reference document for the meeting. It could not give rise to a legitimate consideration that these particular matters would be expressly considered as part of the planning application.

52 In any event, the Update for the May 2021 meeting provided a list of the relevant planning history for the application site and of the adjacent site. It was not necessary for the officer assessment to provide a detailed analysis of the planning history of all the planning proposals for Fews Lane, nor a detailed analysis of every application and associated reasoning in respect of highway safety matters. As set out above in the Background section and under the response to Ground 3, the May 2021 Update referenced the key excerpts from the Officer Report for the 2019 consent regarding highway safety, noting changes in time associated with the nature of High Street Longstanton and the creation of the village by-pass. The appeal decision is also referenced. The relevant planning history was set out and considered.

53 The suggestion that extant permissions are not capable of implementation falls behind the fact that the 2019 consent was not challenged, and the facts set out in response to Ground 4 above. The 2019 consent remains a legitimate fall-back position.

54 Secondly, you state that the description of the development on the decision notice is materially different from the description of the development in the application which was consulted upon, that officers had no lawful authority to amend the description of the development, and that this amounts to an abuse of process.

55 This proposed Ground is misconceived. The very minor change to the description of development brought it into line with the terms of the Planning Committee's resolution. The resolution related to a very minor alteration to the Traffic Management Plan, which was sought by the Committee. The Chair and Vice Chair to the Planning Committee were consulted and agreed to the minor change in the description of development for the Decision Notice. It was also agreed by the applicant. No party could possibly have been prejudiced by the very minor changes to the description of development on the Decision Notice.

56 Insofar as necessary to do so, the Council will rely on s.31(2A) and (3B) of the Senior Courts Act 1981 to argue that it is highly likely that the outcome would have been the same, even if any or all of the Grounds were made out.

57 It is noted that you propose to issue proceedings as an Aarhus Convention claim and to seek a costs capping order. The Council does not dispute that the claim may come within the scope of the Convention, but reserves its position as to whether the proposed Claimant's financial resources meet the criteria of making the claim prohibitively expensive if a costs cap is not applied, depending on the details provided.

Details of any other Interested Parties

It is noted that the applicant under the 2019 consent, Landbrook Homes Ltd. is considered to be an Interested Party.

Disclosure

The Council has noted that it appears no disclosure has been sought by you in the PAP Letter .

The Council would however request disclosure from you as to copies of any relevant papers ,including minutes of any meeting of the shareholders of Fews Lane Consortium Limited ,relating to and/or otherwise authorising the decision of the Claimant to issue the PAP letter of 21st June 2021. Alternatively , if the decision was the sole decision of a Director of the Claimant please confirm that to be the case and whether having made that decision the other shareholders of the Claimant have been so advised.

ADR proposals

It is agreed that ADR proposals would not be appropriate given that only the Court can quash a decision of the Council.

Address for further correspondence and service of court documents

This is set out above in the Reference details section.

Yours Sincerely,

Stephen Reid

Senior Planning Lawyer
acting for South Cambridgeshire District Council

Tel: 01223 457094/07817 730893
Email: stephen.reid@3csharedservices.org

IN THE HIGH COURT OF JUSTICE **Claim No.CO/2372/2021**

QUEEN'S BENCH DIVISION
PLANNING COURT IN THE ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN
(on the application of FEWS LANE CONSORTIUM LTD) Claimant

and

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL Defendant

and

LANDBROOK HOMES LTD Interested Party

Exhibit 12
Email from Daniel Fulton to Stephen Reid
dated 06.07.2021 @ 6.55am

[redacted]

[redacted]

From: Daniel Fulton <dgf@fewslane.co.uk>
Sent: 06 July 2021 06:55
To: Stephen Reid <Stephen.Reid@3csharedservices.org>
Cc: Kelly Stephen <Stephen.Kelly@greatercambridgeplanning.org>; Sharon Brown <Sharon.Brown@greatercambridgeplanning.org>; Toby Williams <Toby.Williams@greatercambridgeplanning.org>; Lewis Tomlinson <Lewis.Tomlinson@greatercambridgeplanning.org>; Rory McKenna <Rory.Mckenna@3csharedservices.org>
Subject: Re: Fews Lane S73 PAP response July5thCl
Importance: High

Dear Mr Reid,

Thank you for the response to the Consortium's pre-action correspondence dated 21 June 2021.

However, no response has been forthcoming to the Consortium's pre-action correspondence dated 4 June 2021 at 12:36 p.m.:

> "Paragraph 13 of the officer's report states that, '1.5m pedestrian visibility splays are available within the adopted highway at the junction of Fews Lane with the High Street'.
>
> Could I please ask the Council to clarify the source of information upon which the above statement is based?"

It is essential that the Council clarifies, in clear and unambiguous terms, the factual circumstances of its decision making process.

If the Council does not do so, this would have the effect of precluding the Consortium from being able to adequately argue its claim.

I must ask for a clear and unambiguous response to the question quoted above by 5:00 p.m. today.

If a satisfactory response is not received by that time, the Consortium will make the following applications when filing the claim form:

1. an application pursuant to CPR Part 18 for an order that the Council provides clarification on the matter referenced above within 7 days of the date of the order,
2. an application for permission for the Claimant to amend the claim form and statement of facts and grounds within 21 days of the date of service of the clarification referenced in point 1 above,
3. an application for permission for the Claimant to adduce additional evidence within 21

days of the date of service of the clarification referenced above in point 1, and

4. an application that the Claimant's application for permission for judicial review be stayed until 21 days have elapsed following the date of service of the clarification referred in point 1 above.

Lastly, I would also note that no response has been received in regards to the Consortium's pre-action correspondence dated 14 June 2021 at 7:36 a.m.

The lack of timely responses to the prospective claimant's requests (from 4 June and 14 June) for factual clarification have significantly increased the prospective claimant's costs of preparing the claim, and the prospective claimant may make reference to these circumstances in the future in regards to costs.

Kind regards,

Daniel Fulton
Director

Fews Lane Consortium Ltd
The Elms
Fews Lane
Longstanton
Cambridge
CB24 3DP

tel. 01954 789237

On 5 Jul 2021, at 4:59pm, Stephen Reid <Stephen.Reid@3csharedservices.org> wrote:

Dear Fews Lane Consortium Limited

Please see attached which I am instructed to send to you on behalf of the Council

Please note it is being sent to you as an email only in the light of your confirmation that an email copy would be accepted.

Please acknowledge receipt and if you have any queries please let me know.

Stephen Reid
Senior Planning Lawyer
3C Shared Services – Legal Practice

Telephone: 01223 457094/07817 730893
Email: stephen.reid@3csharedservices.org

Main Office Address: South Cambridgeshire Hall, Cambourne Business Park, Cambourne, Cambridge, CB23 6EA

3C Shared Services is a strategic partnership between Cambridge City Council, Huntingdonshire District Council and South Cambridgeshire District Council

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From: Stephen Reid <Stephen.Reid@3csharedservices.org>
Sent: 05 July 2021 16:57
To: Stephen Reid <Stephen.Reid@3csharedservices.org>
Subject: Fews Lane S73 PAP response July5thCl

<Fews Lane S73 PAP response July5thCl.pdf>

IN THE HIGH COURT OF JUSTICE **Claim No.CO/2372/2021**

QUEEN'S BENCH DIVISION
PLANNING COURT IN THE ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN
(on the application of FEWS LANE CONSORTIUM LTD) Claimant

and

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL Defendant

and

LANDBROOK HOMES LTD Interested Party

Exhibit 13
Email from Daniel Fulton to Stephen Reid
dated 06.07.2021 @ 1.52pm

[redacted]

From: Daniel Fulton <dgf@fewslane.co.uk>
Sent: 06 July 2021 13:52
To: Stephen Reid <Stephen.Reid@3csharedservices.org>
Cc: Toby Williams <Toby.Williams@greatercambridgeplanning.org>; Sharon Brown <Sharon.Brown@greatercambridgeplanning.org>
Subject: Re: S.73 response
Importance: High

Dear Mr Reid,

I acknowledge receipt of your email.

This is not a full response to the points you raise, but I am able to acknowledge that two mistakes were made in my email from 6:55 a.m. today.

I apologise for incorrectly stating that no response was received to the 4 June 2021 email. I should have stated that the Council declined to provide a substantive response to that email.

The text of that response, from 1:54 p.m. on 4 June 2021, was as follows:

> "I am instructed to write and acknowledge receipt of the three attached emails received from you this week but also to advise that the Council does not at this stage intend to provide a more substantive response to those emails .
>
> I can also confirm that I am instructed that it is the Council's intention to strenuously resist any application for Judicial Review of the recent decision of the Planning Committee as to the s.73 application under reference 20/0245/S73."

I also apologise for incorrectly stating that no response was received to the 14 June 2021 email. Again, I should have stated that the Council declined to provide a substantive response to that email.

The text of that response, from 14 June 2021, was as follows:

> "I acknowledge receipt of a further email received yesterday.
>
> It is not accepted that the planning committee was misdirected . The Council is of the view that it is possible to accommodate 1.5m x 1.5m pedestrian visibility splays within the adopted highway.

It is felt the recent correspondence is not necessarily taking the parties forward and my instructions at this stage are not to engage in further correspondence with you pending the issue of any Judicial Review proceedings as to the Planning Permission issued under reference 20/02453/S73 . I can confirm I am instructed to accept service of any proceedings in such regard."

Kind regards,

Daniel Fulton
Director

Fews Lane Consortium Ltd
The Elms
Fews Lane
Longstanton
Cambridge
CB24 3DP

tel. 01954 789237

On 6 Jul 2021, at 1:08pm, Stephen Reid <Stephen.Reid@3csharedservices.org> wrote:

Dear Fews Lane Consortium Limited

A. I acknowledge receipt of your email sent at 06:55 today.

B.1 In your email today you very clearly state :

"…no response has been forthcoming to the Consortium's pre-action correspondence dated 4 June 2021 at 12:36 p.m…"

B.2 Having regard to B.1 above ,can I ask you to confirm that you did indeed receive a response namely an email sent to you at 13:54 on 4th June 2021 .You have previously already acknowledged this, not least in the context of an email sent by you at 15:15 on 6th June and which email included a copy of the email I had sent on 4th June and so I am not clear why you are now suggesting that no response has been forthcoming.

B.3 When I emailed you on 4th June I referred to paras 30,31,32,33 and 34 from the letter of 14th May and I have again set out those paras below for ease of reference and have added some yellow

highlighting by way of emphasis to show that notwithstanding your email sent today the Council has previously identified the source of information:

"….

30 Whilst there has been some debate as to whether pedestrian splays need to be 1.5m x 1.5m or 2m x 2m, it is the Council's position that 1.5m is the correct figure (see points 14 and 15 and 21.3 of a Cambridgeshire County Council letter dated 12th December 2018 but apparently dealing with the same junction – Fews Lane and High Street,

31 There is a further point namely whether all the land required for such splays is on highway land. There is an email from Jon Finney dated 6th January 2021 in which he confirms that it is all on highway land. This is consistent with earlier comments to the same end, and the later email from Jon Finney on the same date confirms this position even though the relevant land is not shown on the highways register. The land forms part of a grass verge.

32 Please correct me if I am wrong but isn't it the contention of Fews Lane Consortium Limited that such land should still have been shown as included within the application site by reference to the statutory provision for operational development on highway land. If that is the contention, then it is the Council's position that any such contention misses the point as there is no operational development proposed for these visibility splay areas and as it is highway land its use as visibility splays involves no change of use.

33 In his letter Mr Streeten dated 20th July 2020 covered this particular point at paragraph 16(c). With respect to subsequent arguments made by Fews Lane Consortium (e.g. as developed at paragraphs 33-34 of your letter of 8th September 2020) it is the Council's position that these ignore the distinction between operational development on highway land and change of use.

34 Given, as noted above, there is no express requirement for a site location plan (identifying the land to which section 73 application relates) and the proposed change of one condition does not relate to visibility splays, it is the Council's position that any challenge in relation to the s.73 Application is one which is unlikely to succeed…"

C.1 In your email today you also include the following:

"….I would also note that no response has been received in regards to the Consortium's pre-action correspondence dated 14 June

2021 at 7:36 a.m…"

C.2 A response to your email of 14th June was sent the same day in which the following comments were made (although it is acknowledged that my email wrongly referred to an email from you the day before but your email of 14thJune was included as part of the response sent to you on 14th June) so I am not clear why you are now suggesting that no response has been forthcoming to your email of 14th June :

"…It is not accepted that the planning committee was misdirected . The Council is of the view that it is possible to accommodate 1.5m x 1.5m pedestrian visibility splays within the adopted highway.

It is felt the recent correspondence is not necessarily taking the parties forward and my instructions at this stage are not to engage in further correspondence with you pending the issue of any Judicial Review proceedings as to the Planning Permission issued under reference 20/02453/S73 . I can confirm I am instructed to accept service of any proceedings in such regard…."

C.3 Your email of 14th June suggested as follows:

"…No background papers were listed or made available for the committee prior to the decision being taken on the application…"

C.4 Can I refer you however to para 44 of the Report to Planning Committee on 26th May 2021 and which included the following :

"…An extensive bundle of correspondence between FLCL and the Council (together with an index) is attached to this report.."

C.5 The extensive bundle of correspondence attached to the Committee report extended to 119 pages (although it is acknowledged that some of the pages were redacted where they involved corresponce which had been marked by FLCL as "WITHOUT PREJUDICE")

D. In the light of the above, can the Council request that you advise whether you are prepared to send an updated email to correct the email sent at 06;55 today. If, however, you are not prepared to send an email to correct the email sent at 06;55 today it would be helpful if you would please advise why you are not willing to do so.

Stephen Reid

Senior Planning Lawyer
3C Shared Services – Legal Practice
<image001.png>
Telephone: 01223 457094/07817 730893
Email: stephen.reid@3csharedservices.org

Main Office Address: South Cambridgeshire Hall, Cambourne Business Park, Cambourne, Cambridge, CB23 6EA

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From: Daniel Fulton <dgf@fewslane.co.uk>
Sent: 06 July 2021 06:55
To: Stephen Reid <Stephen.Reid@3csharedservices.org>
Cc: Kelly Stephen <Stephen.Kelly@greatercambridgeplanning.org>; Sharon Brown <Sharon.Brown@greatercambridgeplanning.org>; Toby Williams <Toby.Williams@greatercambridgeplanning.org>; Lewis Tomlinson <Lewis.Tomlinson@greatercambridgeplanning.org>; Rory McKenna <Rory.Mckenna@3csharedservices.org>
Subject: Re: Fews Lane S73 PAP response July5thCl
Importance: High

Dear Mr Reid,

Thank you for the response to the Consortium's pre-action correspondence dated 21 June 2021.

However, no response has been forthcoming to the Consortium's pre-action correspondence dated 4 June 2021 at 12:36 p.m.:

"Paragraph 13 of the officer's report states that, '1.5m pedestrian visibility splays are available within the adopted highway at the junction of Fews Lane with the High Street'.

Could I please ask the Council to clarify the source of information upon which the above statement is based?"

It is essential that the Council clarifies, in clear and unambiguous terms, the factual circumstances of its decision making process.

If the Council does not do so, this would have the effect of precluding the Consortium from being able to adequately argue its claim.

I must ask for a clear and unambiguous response to the question quoted above by 5:00 p.m. today.

If a satisfactory response is not received by that time, the Consortium will make the following applications when filing the claim form:

1. an application pursuant to CPR Part 18 for an order that the Council provides clarification on the matter referenced above within 7 days of the date of the order,
2. an application for permission for the Claimant to amend the claim form and statement of facts and grounds within 21 days of the date of service of the clarification referenced in point 1 above,
3. an application for permission for the Claimant to adduce additional evidence within 21 days of the date of service of the clarification referenced above in point 1, and
4. an application that the Claimant's application for permission for judicial review be stayed until 21 days have elapsed following the date of service of the clarification referred in point 1 above.

Lastly, I would also note that no response has been received in regards to the Consortium's pre-action correspondence dated 14 June 2021 at 7:36 a.m.

The lack of timely responses to the prospective claimant's requests (from 4 June and 14 June) for factual clarification have significantly increased the prospective claimant's costs of preparing the claim, and the prospective claimant may make reference to these circumstances in the future in regards to costs.

Kind regards,

Daniel Fulton
Director

Fews Lane Consortium Ltd
The Elms
Fews Lane
Longstanton
Cambridge
CB24 3DP

tel. 01954 789237

On 5 Jul 2021, at 4:59pm, Stephen Reid <Stephen.Reid@3csharedservices.org> wrote:

Dear Fews Lane Consortium Limited

Please see attached which I am instructed to send to you on behalf of the Council

Please note it is being sent to you as an email only in the light of your confirmation that an email copy would be accepted.

Please acknowledge receipt and if you have any queries please let me know.

Stephen Reid
Senior Planning Lawyer
3C Shared Services – Legal Practice
<image001.png>
Telephone: 01223 457094/07817 730893
Email: stephen.reid@3csharedservices.org

Main Office Address: South Cambridgeshire Hall, Cambourne Business Park, Cambourne, Cambridge, CB23 6EA

3C Shared Services is a strategic partnership between Cambridge City Council, Huntingdonshire District Council and South Cambridgeshire District Council

From: Stephen Reid <Stephen.Reid@3csharedservices.org>
Sent: 05 July 2021 16:57
To: Stephen Reid <Stephen.Reid@3csharedservices.org>
Subject: Fews Lane S73 PAP response July5thCl

From: Stephen Reid
Sent: 04 June 2021 13:54
To: Daniel Fulton <dgf@fewslane.co.uk>
Cc: Kelly Stephen <Stephen.Kelly@greatercambridgeplanning.org>; Sharon Brown <Sharon.Brown@greatercambridgeplanning.org>; Toby Williams <Toby.Williams@greatercambridgeplanning.org>; Lewis Tomlinson <Lewis.Tomlinson@greatercambridgeplanning.org>
Subject: FW: S.73 response

Dear Fews Lane Consortium Limited

Notwithstanding your email sent at 12:59 today may I invite you to look

at paragraphs numbered 30,31,32,33 and 34 of the attached letter sent to as recently as 14th May this year, and which it is believed dealt with the matters now raised in relation to your further emails received this week.

It is not the Council's intention to add anything further at this stage.

Stephen Reid

From: Daniel Fulton <dgf@fewslane.co.uk>
Sent: 04 June 2021 12:59
To: Stephen Reid <Stephen.Reid@3csharedservices.org>
Cc: Kelly Stephen <Stephen.Kelly@greatercambridgeplanning.org>; Sharon Brown <Sharon.Brown@greatercambridgeplanning.org>; Toby Williams <Toby.Williams@greatercambridgeplanning.org>; Lewis Tomlinson <Lewis.Tomlinson@greatercambridgeplanning.org>
Subject: Re: s.73 application Fews lane

Dear Mr Reid,

Paragraph 13 of the judicial review pre-action protocol states that:

"Requests for information and documents made at the pre-action stage should be proportionate and should be limited to what is properly necessary for the claimant to understand why the challenged decision has been taken and/or to present the claim in a manner that will properly identify the issues. The defendant should comply with any request which meets these requirements unless there is good reason for it not to do so. Where the court considers that a public body should have provided relevant documents and/or information, particularly where this failure is a breach of a statutory or common law requirement, it may impose costs sanctions."

Section 100D(1) of the Local Government Act 1972 requites that a list of background papers that disclose any facts or matters on which a report or a part of a report is based and have been relied upon to a material extent in the preparation of said report.

In respect of decision 20/02453/S73, the Council failed to comply with this statutory requirement. Had the Council done so, this email seeking information on the decision would not be necessary.

Paragraph 13 of the officer's report states that, "1.5m pedestrian visibility splays are available within the adopted highway at the junction of Fews Lane with the High Street".

Could I please ask the Council to clarify the source of information upon which the above statement is based?

If the Council declines to respond to this query, this is likely to be drawn to the attention of the court in relation to the issue of costs.

Kind regards,

Daniel Fulton
Director

Fews Lane Consortium Ltd
The Elms
Fews Lane
Longstanton
Cambridge
CB24 3DP

tel. 01954 789237

On 4 Jun 2021, at 11:31am, Stephen Reid <Stephen.Reid@3csharedservices.org> wrote:

Dear Fews Lane Consortium Limited

I am instructed to write and acknowledge receipt of the three attached emails received from you this week but also to advise that the Council does not at this stage intend to provide a more substantive response to those emails .

I can also confirm that I am instructed that it is the Council's intention to strenuously resist any application for Judicial Review of the recent decision of the Planning Committee as to the s.73 application under reference 20/0245/S73.

Stephen Reid
Senior Planning Lawyer
3C Shared Services – Legal Practice
<image001.png>
Telephone: 01223 457094/07817 730893
Email: stephen.reid@3csharedservices.org

Main Office Address: South Cambridgeshire Hall, Cambourne Business Park, Cambourne, Cambridge, CB23 6EA

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<Mail Attachment.eml><Mail Attachment.eml><Mail Attachment.eml>

From: Stephen Reid <Stephen.Reid@3csharedservices.org>
Sent: 04 June 2021 13:05
To: Stephen Reid <Stephen.Reid@3csharedservices.org>
Subject: FW: S.73 response

Stephen Reid
Senior Planning Lawyer
3C Shared Services – Legal Practice
<image001.png>
Telephone: 01223 457094/07817 730893
Email: stephen.reid@3csharedservices.org

Main Office Address: South Cambridgeshire Hall, Cambourne Business Park, Cambourne, Cambridge, CB23 6EA

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---

From: Stephen Reid
Sent: 14 May 2021 16:17
To: Daniel Fulton <dgf@fewslane.co.uk>
Cc: Kelly Stephen <Stephen.Kelly@greatercambridgeplanning.org>; Sharon Brown <Sharon.Brown@greatercambridgeplanning.org>; Toby Williams <Toby.Williams@greatercambridgeplanning.org>; Lewis Tomlinson <Lewis.Tomlinson@greatercambridgeplanning.org>
Subject: FW: S.73 response

Dear Fews Lane Consortium Limited

I am instructed to email you the attached.

I will make arrangements for a hard copy to be sent in the post to you but please note this will not be until next week.

Stephen Reid

<S.73 response.docx>

IN THE HIGH COURT OF JUSTICE **Claim No.CO/2372/2021**

QUEEN'S BENCH DIVISION
PLANNING COURT IN THE ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN
(on the application of FEWS LANE CONSORTIUM LTD) Claimant

and

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL Defendant

and

LANDBROOK HOMES LTD Interested Party

Exhibit 14
Email from Stephen Reid to Daniel Fulton
dated 06.07.2021 @ 1.54pm

[redacted]

From: Stephen Reid
Sent: 06 July 2021 15:34
To: Daniel Fulton <dgf@fewslane.co.uk>
Cc: Toby Williams <Toby.Williams@greatercambridgeplanning.org>; Sharon Brown <Sharon.Brown@greatercambridgeplanning.org>; Rory McKenna <Rory.Mckenna@3csharedservices.org>
Subject: FW: S.73 response
Importance: High

Dear Fews Lane Consortium Limited

A. You have now emailed me a further email in which you have included the following:

"…I acknowledge receipt of your email.

This is not a full response to the points you raise, but I am able to acknowledge that two mistakes were made in my email from 6:55 a.m. today.

I apologise for incorrectly stating that no response was received to the 4 June 2021 email. I should have stated that the Council declined to provide a substantive response to that email.

The text of that response, from 1:54 p.m. on 4 June 2021, was as follows:

"I am instructed to write and acknowledge receipt of the three attached emails received from you this week but also to advise that the Council does not at this stage intend to provide a more substantive response to those emails .

I can also confirm that I am instructed that it is the Council's intention to strenuously resist any application for Judicial Review of the recent decision of the Planning Committee as to the s.73 application under reference 20/0245/S73."

B. The email you have wrongly quoted from in your latest email however was not the one I sent at 1;54 on 4th June but rather one I sent at 11;31 on 4th June.

C. You appear not to have taken note of para B.3 of my email sent earlier

today so may I point out the email sent at 1:54 on 4th June ,and which email is again set out below and which I have now highlighted in green .

D. I feel it is wholly incorrect for you to suggest that "…the Council declined to provide a substantive response…" because the email sent at 1;54 on 4th June very clearly referred to the source of information by reference to the letter of 14th May 2021 and I again set out below paras 30 and 31 from the letter of 14th May which was attached to the email of 4th June and which paras (and also paras 32,33 and 34) are very clearly referred to in the email of 4th June :

"….30 Whilst there has been some debate as to whether pedestrian splays need to be 1.5m x 1.5m or 2m x 2m, it is the Council's position that 1.5m is the correct figure (see points 14 and 15 and 21.3 of a Cambridgeshire County Council letter dated 12th December 2018 but apparently dealing with the same junction – Fews Lane and High Street,

31 There is a further point namely whether all the land required for such splays is on highway land. There is an email from Jon Finney dated 6th January 2021 in which he confirms that it is all on highway land. This is consistent with earlier comments to the same end, and the later email from Jon Finney on the same date confirms this position even though the relevant land is not shown on the highways register. The land forms part of a grass verge.

E. I also note that in your latest email you have not sought to address paras C.3 and C.4 as included in my earlier email of today so you may want to consider whether to comment in such regard

C.3 Your email of 14th June suggested as follows:

"…No background papers were listed or made available for the committee prior to the decision being taken on the application…"

C.4 Can I refer you however to para 44 of the Report to Planning Committee on 26th May 2021 and which included the following :

"…An extensive bundle of correspondence between FLCL and the Council (together with an index) is attached to this report.."

Stephen Reid
Senior Planning Lawyer
3C Shared Services – Legal Practice

Telephone: 01223 457094/07817 730893
Email: stephen.reid@3csharedservices.org

Main Office Address: South Cambridgeshire Hall, Cambourne Business Park, Cambourne, Cambridge, CB23 6EA

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From: Stephen Reid
Sent: 04 June 2021 13:54
To: Daniel Fulton <dgf@fewslane.co.uk>
Cc: Kelly Stephen <Stephen.Kelly@greatercambridgeplanning.org>; Sharon Brown <Sharon.Brown@greatercambridgeplanning.org>; Toby Williams <Toby.Williams@greatercambridgeplanning.org>; Lewis Tomlinson <Lewis.Tomlinson@greatercambridgeplanning.org>
Subject: FW: S.73 response

Dear Fews Lane Consortium Limited

Notwithstanding your email sent at 12:59 today may I invite you to look at paragraphs numbered 30,31,32,33 and 34 of the attached letter sent to as recently as 14th May this year, and which it is believed dealt with the matters now raised in relation to your further emails received this week.

It is not the Council's intention to add anything further at this stage.

Stephen Reid

From: Daniel Fulton <dgf@fewslane.co.uk>
Sent: 04 June 2021 12:59
To: Stephen Reid <Stephen.Reid@3csharedservices.org>
Cc: Kelly Stephen <Stephen.Kelly@greatercambridgeplanning.org>; Sharon Brown <Sharon.Brown@greatercambridgeplanning.org>; Toby Williams <Toby.Williams@greatercambridgeplanning.org>; Lewis Tomlinson <Lewis.Tomlinson@greatercambridgeplanning.org>
Subject: Re: s.73 application Fews lane

Dear Mr Reid,

Paragraph 13 of the judicial review pre-action protocol states that:

“Requests for information and documents made at the pre-action stage should be proportionate and should be limited to what is properly necessary for the claimant to understand why the challenged decision has been taken and/or to present the claim in a manner that will properly identify the issues. The defendant should comply with any request which meets these requirements unless there is good reason for it not to do so. Where the court considers that a public body should have provided relevant documents and/or information, particularly where this failure is a breach of a statutory or common law requirement, it may impose costs sanctions.”

Section 100D(1) of the Local Government Act 1972 requites that a list of background papers that disclose any facts or matters on which a report or a part of a report is based and have been relied upon to a material extent in the preparation of said report.

In respect of decision 20/02453/S73, the Council failed to comply with
this statutory requirement. Had the Council done so, this email seeking information on the decision would not be necessary.

Paragraph 13 of the officer’s report states that, “1.5m pedestrian visibility splays are available within the adopted highway at the junction of Fews Lane with the High Street”.

Could I please ask the Council to clarify the source of information upon which the above statement is based?

If the Council declines to respond to this query, this is likely to be drawn to the attention of the court in relation to the issue of costs.

Kind regards,

Daniel Fulton
Director

Fews Lane Consortium Ltd
The Elms
Fews Lane
Longstanton
Cambridge
CB24 3DP

tel. 01954 789237

On 4 Jun 2021, at 11:31am, Stephen Reid <Stephen.Reid@3csharedservices.org> wrote:

Dear Fews Lane Consortium Limited

I am instructed to write and acknowledge receipt of the three attached emails received from you this week but also to advise that the Council does not at this stage intend to provide a more substantive response to those emails .

I can also confirm that I am instructed that it is the Council's intention to strenuously resist any application for Judicial Review of the recent decision of the Planning Committee as to the s.73 application under reference 20/0245/S73.

Stephen Reid
Senior Planning Lawyer
3C Shared Services – Legal Practice
<image001.png>
Telephone: 01223 457094/07817 730893
Email: stephen.reid@3csharedservices.org

Main Office Address: South Cambridgeshire Hall, Cambourne Business Park, Cambourne, Cambridge, CB23 6EA

3C Shared Services is a strategic partnership between Cambridge City Council, Huntingdonshire District Council and South Cambridgeshire District Council

---

From: Stephen Reid <Stephen.Reid@3csharedservices.org>
Sent: 04 June 2021 13:05
To: Stephen Reid <Stephen.Reid@3csharedservices.org>
Subject: FW: S.73 response

Stephen Reid
Senior Planning Lawyer
3C Shared Services – Legal Practice

Telephone: 01223 457094/07817 730893
Email: stephen.reid@3csharedservices.org

Main Office Address: South Cambridgeshire Hall, Cambourne Business Park, Cambourne, Cambridge, CB23 6EA

3C Shared Services is a strategic partnership between Cambridge City Council, Huntingdonshire District Council and South Cambridgeshire District Council

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From: Stephen Reid
Sent: 14 May 2021 16:17
To: Daniel Fulton <dgf@fewslane.co.uk>
Cc: Kelly Stephen <Stephen.Kelly@greatercambridgeplanning.org>; Sharon Brown <Sharon.Brown@greatercambridgeplanning.org>; Toby Williams <Toby.Williams@greatercambridgeplanning.org>; Lewis Tomlinson <Lewis.Tomlinson@greatercambridgeplanning.org>
Subject: FW: S.73 response

Dear Fews Lane Consortium Limited

I am instructed to email you the attached.

I will make arrangements for a hard copy to be sent in the post to you but please note this will not be until next week.

Stephen Reid

3C Shared Services
PO Box 700, Cambridge CB1 0JH

Fews Lane Consortium Limited

Date:14th May 2021

Dear Sirs

Proposed claim for judicial review in relation to prospective planning permission 20/02453/s73 and 20/05101/FUL

We write in relation to your pre-action protocol letter dated 30th April 2021 in which you indicate your intention to challenge by way of judicial review the Council's decision to entertain planning applications under ref 20/02453/s73 and 20/05101/FUL

The Prospective Claimant

1 The Prospective Claimant would be Fews Lane Consortium Limited.

The Prospective Defendant

2 The Prospective Defendant is South Cambridgeshire District Council.

Correspondence should be addressed to:
3C Shared Services – The Legal Practice
South Cambridgeshire Hall
Cambourne Business Park
Cambourne
Cambridge CB23 6EA

The Solicitor dealing with the conduct of this matter is Stephen Reid.

Response to the claim

3 The first matter that I would draw to your attention is that the application under reference 20/05101/FUL is now the subject of an appeal (for non-determination) and whilst the Council is waiting to be advised as to the allocation of an Appeal Inspector the Council's position is that this application is no longer within its jurisdiction as Local Planning

Authority and therefore it is intended that this response letter will only address matters in relation to the application under planning reference 20/02453/s73.

4. You will recall that Fews Lane Consortium Limited had previously issued a Pre Action Protocol letter dated 27th July 2020 in relation to the application under 20/02453/s73 and where a response was sent dated 18th August 2020 and therefore in the first part of this response I intend to again address a number of points as set out in that response.

5 In the second part of this response I intend to then seek to address matters which have arisen post 18th August where I believe them to be relevant.

6 However, before moving to the first part of the response there is an initial point that I would like to highlight namely that the Council received an email from Mr Caddoo dated 21st August 2020 in which he asked the Council to accept the email as "..confirmation on behalf of the applicant, Landbrook Homes Ltd, that the S.73 application under 20/02453/s73 is in relation to the same red line location plan submitted under planning reference S/0277/19/FL…"

FIRST PART

7 Your claim challenges a section 73 application under planning reference 20/02453/s73 (the "s.73 Application") in relation to the grant of planning permission for the erection of 2 dwellings with parking.

8 The principles on which a claim for judicial review of a decision to grant planning permission may be brought have been shortly stated by Lord Justice Lindblom in Mansell v Tonbridge and Malling BC [2017] EWCA Civ 1314 at paragraph 42. We do not set out these fundamental principles in full in this letter but they are referred to where appropriate below.

9 While your letter of 30th April 2021 makes various assertions by way of complaint about the omission of visibility splays it is felt the Consortium has failed to substantiate how an alleged error of law will arise.

10 The Council has noted earlier complaints on a similar matter in relation to a planning application for development in Waterbeach. In response to that complaint, the Council sought advice from Counsel and responded to the consortium. The Council's advice from Charles Streeton of Counsel on that matter was provided to the Consortium.

11 Turning to the points made at paragraph 10 of your letter dated 27th July 2020, and which is set out below for ease of reference.

"..(10) The question of whether or not visibility splays are required in order for the proposed development to be acceptable in planning terms is a matter of planning judgment that is within the purview of the decision maker. However, pursuant to section 327A of the 1990 Act, the Council does not have the discretion to decide that it will entertain an application that fails to comply with a requirement as to the form or content of any document which accompanies the application…"

12 The basis of the Consortium's proposed claim is an allegation that any decision to grant planning permission for the Development pursuant to the S.73 Application would not accord with the requirements imposed by the Town and Country Planning (Development Management Procedure) (England) Order 2015 ("the **2015 Order**") and thus would also be in breach of section 327A of the Town and Country Planning Act 1990 ("the **1990 Act**"). It appears alleged that the land outlined in red on the location plan for

S/0277/19/FL does not include all of the land necessary to carry out the proposed development as it does not include all of the land required for visibility splays.

13 In relation to a similar point raised by the Consortium albeit on a completely different site and in a completely different location Charles Streeten of FTB has advised that for the reasons set out further below he was of the opinion that:

a The Council granting planning permission for development which relies on adopted highway land outside the red line site boundary as part of the visibility splays is not in breach of the requirements of the 2015 Order.

b Provided land on which any operational development will take place is within the red line boundary, and the remaining land is adopted highway, Mr Streeten is of the view that the requirements of the 2015 Order will be complied with and it is not necessary to include in the red line boundary all of the land required as visibility splay where such land is part of the adopted highway.

c Even if he is wrong in relation to the above, the prospect of a claim for judicial review succeeding in the case where he was asked to advise was low. Given the similarities of that matter and the current complaint, the Council is of a similar opinion in relation to the S.73 Application not least having regard to the confirmation referred to at paragraph numbered 6 above.

14 **LAW**

The Statutory Scheme

14.1 The 2015 Order is made, inter alia, pursuant to section 59 of the 1990 Act. It dictates the procedure by which planning applications must be determined.

14.2 Section 327A of the 1990 Act states:

"(1) This section applies to any application in respect of which this Act or any provision made under it imposes a requirement as to—(a) the form or manner in which the application must be made; (b) the form or content of any document or other matter which accompanies the application.

(2) The local planning authority must not entertain such an application if it fails to comply with the requirement."

14.3 A local planning authority should not entertain an application for planning permission unless it complies with the requirements of the 2015 Order but please note the comments under paragraphs numbered 12 and 22 below.

15 **Non-Compliance with the DMOP**

15.1 It should, however, be noted that notwithstanding the apparently strict wording of section 327A, the High Court has made clear that a breach of the requirements in the 2015 Order does not, necessarily, mean that a grant of planning permission will be quashed (see R (Bishop) v Westminster CC [2017] EWHC 3102 (Admin) at para. 23). Rather, the court retains its discretion regarding whether or not to quash a planning permission granted in breach of the 2015 Order. Indeed, in a case where it is 'highly likely' that the outcome would not have been substantially different absent the error, the court is under a duty pursuant to section 31 of the Senior Courts Act 1981 (as amended) to refuse both permission for judicial review and relief.

16 **Article 7 of the 2015 Order**

16.1 Article 7 of the 2015 Order is entitled "General requirements: applications for planning permission including outline planning permission". Article 7(1)(b) requires that an application for planning permission must "include the particulars specified or referred to in the form". It should also be noted that Article 7(1)(c) requires the application be accompanied inter alia by (i) a plan which identifies the land to which the application relates; (ii) any other plans, drawings and information necessary to describe the development which is the subject of the application.

16.2 The section of the application form to which the Consortium referred to in the letter of 27th July 2020 reads as follows:

"The application site must be edged clearly with a red line on the location plan. It should include all land necessary to carry out the proposed development (e.g. land required for access to the site from a public highway, visibility splays (access around a road junction or access, which should be free from obstruction), landscaping, car parking and open areas around buildings)."

17 This is also reflected in the Government's Planning Practice Guidance ("**PPG**") which says at reference ID 14-024-20140306:

"The application site should be edged clearly with a red line on the location plan. It should include all land necessary to carry out the proposed development (eg land required for access to the site from a public highway, visibility splays, landscaping, car parking and open areas around buildings). A blue line should be drawn around any other land owned by the applicant, close to or adjoining the application site."

18 In interpreting these words Mr Streeten has advised that it is important not to lose sight of their context. They have not been drafted as would a policy, still less with the care given to the drafting of legislation. In both cases are intended as practical guidance to those completing an application for planning permission. They should therefore be read with a considerable degree of common sense and not subjected to exegetical legal analysis. If authority is required for this proposition, it is to be found in R (Solo Retail Limited) v Torridge DC [2019] EWHC 489 (Admin) at para. 33.

ANALYSIS

19 The particular point at issue is the location of any visibility splays required to ensure the access to the Development is safe. In relation to the visibility splays for the junction of Fews Lane and High Street Longstanton all the land outside the red line boundary covered by those visibility splays is within the existing adopted highway. The Highway Authority officers have confirmed their view that no other land is required to secure the necessary visibility for this development.

20 The issue, therefore, is whether planning permission for the Development can be granted pursuant to the S.73 Application, notwithstanding that an area included within the visibility splay is on adopted highway outside the red line boundary. The view of the Council is that it can:

20.1 Firstly, the text of both the application form and the guidance refers to "all land necessary to carry out the proposed development". Mr Streeten's has expressed a view that the word "development" is of central importance. If land is not being developed, it does not need to be included within the red line boundary. Thus, although land that is not adopted highway such that its use needs to be changed to be used as a visibility splay may need to be shown within the red line

boundary. Where, however, the land used for the visibility splay is already adopted highway, and no operational development is required, it does not need to be included within the red line.

20.2 Secondly, Mr Streeten has advised that an over literal reading of the application form and PPG would create absurd results. As I have pointed out to you in the past, both refer to car parking and open areas around buildings. If, however, the development proposed does not include any car parking it plainly would not be invalid if the red line on the location plan did not show land for car parking which is not being provided or required. Similarly, if the application was such that the footprint of a proposed building meant there were to be no open areas around it, the effect of the application form is clearly not intended to be that the application is invalid because it fails to show any open areas. On the contrary, as both the form and the PPG make clear, the references given are mere examples, and are not intended to be prescriptive or exhaustive. Ultimately, what land is necessary to carry out the proposed development will be a matter of judgement for the local planning authority to determine on the facts of any given case.

21 Mr Streeten, as a caveat to the above (and leaving aside the questions which arise where works are carried out pursuant to an agreement under section 278 of the Highways Act 1980), advised in relation to the other matter that if operational development such as engineering works are required to provide or alter an access, this may amount to development and should, therefore, be included within the red line boundary.

22 Applying these principles, Mr Streeten expressed an opinion as set out below (in the case where he was asked to advise) :

22.1 Provided that all of the relevant land upon which works to create the access for the Development fall within the red line boundary, the Council would be entitled to conclude that the land necessary to carry out the proposed development does not include land falling within the visibility splays but outwith the red line boundary, which is adopted highway.

22.2 Provided that the red line boundary includes the land upon which operational development is required to provide the access, it is not necessary to include within the red line boundary other land which is adopted highway and forms part of the relevant visibility splay.

23 In the other case, Mr Streeten advised that even if he is wrong, he is of the view that the prospects of bringing a successful claim for judicial review in that case would be low and he cannot see what prejudice could be said to result from not including adopted highway land forming part of the visibility splay within the red line boundary for the development. His view was that he felt a claim for judicial review would be likely to be refused permission and/or relief pursuant to section 31 of the Senior Courts Act 1981 on the basis that it is highly likely the outcome would not have been substantially different absent any error of law identified. The same point is considered by the Council to apply here.

24 In any event, even if (which is denied) there was some error in the validation process, the Court has a discretion whether or not to quash a grant of planning permission, depending on a variety of factors, including:

- the consequences of non-compliance,
- the nature of the failure,
- the identity of the applicant for relief,

- the lapse of time ,and
- the effect on other parties

25 The Consortium have (in the other case where Mr Streeten has advised) suggested that:

"… It is difficult to see how anyone's interests could be prejudiced by the Council insisting that the entire 43 metre x 2.4 metre visibility splays are included within the red line boundaries of the application site, the appropriate notices being served upon the owners of land within the application site, and the appropriate ownership certificate being filed by the applicant…."
It is the Council's view that this suggestion as to extent of the red line boundaries is not the relevant legal test as to whether an application is valid

SECOND PART

26 Officers are of the view that the change sought under the s.73 Application makes no material changes to the actual development proposed and the purpose of the new condition is solely to make detailed provision for construction traffic.

27 Officers are mindful that an approval of a s.73 application results in a new planning permission and not an amendment of the original. Further, whilst the guidance quoted in paragraph 21 of the Officer's Report presented to Planning Committee in [January 2021] is correct to limit attention to conditions that are the subject of the application, officers are also mindful of the need to consider whether any material change of policy or other circumstances which might require a re-assessment of other conditions or, indeed, the development as a whole, see R v Stefanou v Westminster City Council & Ano [2107] EWHC 908 (Admin) at [90].

28 Officers are mindful of the complaints which refer to the inadequacies of the site plan supplied with the original application – but it is submitted it is too late to challenge the validity of the permission pursuant to that original application. Fews Lane Consortium Limited at least at one stage sought to suggest a plan is required by reference to the article 7(1)(b) – which requires particulars to be included as specified in the application form but as a simple matter of statutory interpretation the Council's position is that cannot include a plan which is dealt with separately and expressly by (c).

29 It follows that officers do not consider it is necessary to request a further plan, as indicated in paragraph 3 of the response dated 18th August 2020 but please note reference to confirmation under paragraph numbered 6 above

30 Whilst there has been some debate as to whether pedestrian splays need to be 1.5m x 1.5m or 2m x 2m, it is the Council's position that 1.5m is the correct figure (see points 14 and 15 and 21.3 of a Cambridgeshire County Council letter dated 12th December 2018 but apparently dealing with the same junction – Fews Lane and High Street,

31 There is a further point namely whether all the land required for such splays is on highway land. There is an email from Jon Finney dated 6th January 2021 in which he confirms that it is all on highway land. This is consistent with earlier comments to the same end, and the later email from Jon Finney on the same date confirms this position even though the relevant land is not shown on the highways register. The land forms part of a grass verge.

32 Please correct me if I am wrong but isn't it the contention of Fews Lane Consortium Limited that such land should still have been shown as included within the application site by reference to the statutory provision for operational development on highway land. If that is the contention, then it is the Council's position that any such contention misses

the point as there is no operational development proposed for these visibility splay areas and as it is highway land its use as visibility splays involves no change of use.

33 In his letter Mr Streeten dated 20th July 2020 covered this particular point at paragraph 16(c). With respect to subsequent arguments made by Fews Lane Consortium (e.g. as developed at paragraphs 33-34 of your letter of 8th September 2020) it is the Council's position that these ignore the distinction between operational development on highway land and change of use.

34 Given, as noted above, there is no express requirement for a site location plan (identifying the land to which section 73 application relates) and the proposed change of one condition does not relate to visibility splays, it is the Council's position that any challenge in relation to the s.73 Application is one which is unlikely to succeed

35 Notwithstanding what Fews Lane say as to the apparent stringent terms of section 327A of the 1990 Act, the Court will still have a discretion as to whether or not to quash. Mr Streeten deals with this in his Advice (at paragraph 7), and I would add to the case references made by Mr Streeten reference to the case of Maximus Networks Ltd v SSCLG and Southwark LBC and LH Hammersmith and Fulham [2018] EWHC 1933 (Admin) at [24-26]

36 Whilst in paragraph (18) of your letter dated 30th April 2021 you have said as set out below it is the Council's position that when a fresh report is taken to Planning Committee as to the sS.73 Application it will address the extent of the red line for the purposes of the s.73 Application and the need for any visibility splays and where they are located if outside of the red line

"(18) However, in this case, the prospective defendant has decided to entertain purported planning applications where that land necessary for visibility splays has been specifically excluded from the application site in contravention of the requirements of the 2015 Order. This effectively prevents a condition for adequate visibility splays from being attached to any permission granted…"

37 Officers are satisfied that the Application under reference S/0277/19/FL and the associated committee report considered representations concerning the adequacy of the access to the plot, proposed improvements including the widening of the Fews Lane access, visibility splays and the extent of the red line. Fews Lane Consortium are asked to acknowledge that the permission granted pursuant to that application can no longer be judicially challenged.

38 Notwithstanding that the s.73 Application seeks to amend only the Traffic Management Plan, the officer report to be presented to Planning Committee before determination of the S.73 Application will consider the representations of Fews Lane Consortium Limited , the necessity and reasonableness of requiring upgrades to Fews Lane through the S73 Application including the provision of visibility splays.

39 Officers of the Council are satisfied that as the local Planning Authority it does have jurisdiction to entertain the S73 Application and for all of the reasons set out or referred to above, the Council will resist any application for judicial review.

40 The Council has noted that the Consortium has not indicated if it would prefer to resolve the dispute without the need for legal proceedings or whether the Consortium would agree to participate in an appropriate form of ADR. In the other case referred to above, the Consortium were sent a copy of the advice from Mr Streeten and the Consortium were invited to take their own advice from counsel so that any points in such an advice could be put to Mr Streeten for him to review. It is not clear if such advice has been

sought by the Consortium, notwithstanding the Council's invitation and in these circumstances the Council reserves the right to bring to the Court's attention the invitation which was made in such regard . The Council is also mindful that in a conversation on 20th April 2021 Mr Fulton said that he had received written "legal advice" and which "legal advice" he said he would share it with Council the same day but a copy of that "legal advice" has never been forthcoming.

41 Finally, the Council agrees that the applicant for the S.73 Application , Landbrook Homes Ltd , would be an interested party in respect of any claim.

Yours faithfully

Stephen Reid
Senior Planning Lawyer
acting for South Cambridgeshire District Council

Tel: 01223 457094
Email: stephen.reid@3csharedservices.org

IN THE HIGH COURT OF JUSTICE **Claim No.CO/2372/2021**

QUEEN'S BENCH DIVISION
PLANNING COURT IN THE ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN
(on the application of FEWS LANE CONSORTIUM LTD) Claimant

and

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL Defendant

and

LANDBROOK HOMES LTD Interested Party

Exhibit 15
Email from Stephen Reid to Daniel Fulton
dated 06.07.2021 @ 3.34pm

[redacted]

[redacted]

From: Stephen Reid
Sent: 06 July 2021 15:34
To: Daniel Fulton <dgf@fewslane.co.uk>
Cc: Toby Williams <Toby.Williams@greatercambridgeplanning.org>; Sharon Brown <Sharon.Brown@greatercambridgeplanning.org>; Rory McKenna <Rory.Mckenna@3csharedservices.org>
Subject: FW: S.73 response
Importance: High

Dear Fews Lane Consortium Limited

A. You have now emailed me a further email in which you have included the following:

"…I acknowledge receipt of your email.

This is not a full response to the points you raise, but I am able to acknowledge that two mistakes were made in my email from 6:55 a.m. today.

I apologise for incorrectly stating that no response was received to the 4 June 2021 email. I should have stated that the Council declined to provide a substantive response to that email.

The text of that response, from 1:54 p.m. on 4 June 2021, was as follows:

"I am instructed to write and acknowledge receipt of the three attached emails received from you this week but also to advise that the Council does not at this stage intend to provide a more substantive response to those emails .

I can also confirm that I am instructed that it is the Council's intention to strenuously resist any application for Judicial Review of the recent decision of the Planning Committee as to the s.73 application under reference 20/0245/S73."

B. The email you have wrongly quoted from in your latest email however was not the one I sent at 1;54 on 4th June but rather one I sent at 11;31 on 4th June.

C. You appear not to have taken note of para B.3 of my email sent earlier today so may I point out the email sent at 1:54 on 4th June ,and which email is again set out below and which I have now highlighted in green .

D. I feel it is wholly incorrect for you to suggest that "…the Council declined to provide a substantive response…" because the email sent at 1;54 on 4th June very clearly referred to the source of information by reference to the letter of 14th May 2021 and I again set out below paras 30 and 31 from the letter of 14th May which was attached to the email of 4th June and which paras (and also paras 32,33 and 34) are very clearly referred to in the email of 4th June :

"….30 Whilst there has been some debate as to whether pedestrian splays need to be 1.5m x 1.5m or 2m x 2m, it is the Council's position that 1.5m is the correct figure (see points 14 and 15 and 21.3 of a Cambridgeshire County Council letter dated 12th December 2018 but apparently dealing with the same junction – Fews Lane and High Street,

31 There is a further point namely whether all the land required for such splays is on highway land. There is an email from Jon Finney dated 6th January 2021 in which he confirms that it is all on highway land. This is consistent with earlier comments to the same end, and the later email from Jon Finney on the same date confirms this position even though the relevant land is not shown on the highways register. The land forms part of a grass verge.

E. I also note that in your latest email you have not sought to address paras C.3 and C.4 as included in my earlier email of today so you may want to consider whether to comment in such regard

C.3 Your email of 14th June suggested as follows:

"…No background papers were listed or made available for the committee prior to the decision being taken on the application…"

C.4 Can I refer you however to para 44 of the Report to Planning Committee on 26th May 2021 and which included the following :

"…An extensive bundle of correspondence between FLCL and the Council (together with an index) is attached to this report.."

Stephen Reid
Senior Planning Lawyer

3C Shared Services – Legal Practice

Telephone: 01223 457094/07817 730893
Email: stephen.reid@3csharedservices.org

Main Office Address: South Cambridgeshire Hall, Cambourne Business Park, Cambourne, Cambridge, CB23 6EA

3C Shared Services is a strategic partnership between Cambridge City Council, Huntingdonshire District Council and South Cambridgeshire District Council

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From: Stephen Reid
Sent: 04 June 2021 13:54
To: Daniel Fulton <dgf@fewslane.co.uk>
Cc: Kelly Stephen <Stephen.Kelly@greatercambridgeplanning.org>; Sharon Brown <Sharon.Brown@greatercambridgeplanning.org>; Toby Williams <Toby.Williams@greatercambridgeplanning.org>; Lewis Tomlinson <Lewis.Tomlinson@greatercambridgeplanning.org>
Subject: FW: S.73 response

Dear Fews Lane Consortium Limited

Notwithstanding your email sent at 12:59 today may I invite you to look at paragraphs numbered 30,31,32,33 and 34 of the attached letter sent to as recently as 14th May this year, and which it is believed dealt with the matters now raised in relation to your further emails received this week.

It is not the Council's intention to add anything further at this stage.

Stephen Reid

From: Daniel Fulton <dgf@fewslane.co.uk>
Sent: 04 June 2021 12:59
To: Stephen Reid <Stephen.Reid@3csharedservices.org>
Cc: Kelly Stephen <Stephen.Kelly@greatercambridgeplanning.org>; Sharon Brown <Sharon.Brown@greatercambridgeplanning.org>; Toby Williams <Toby.Williams@greatercambridgeplanning.org>; Lewis Tomlinson <Lewis.Tomlinson@greatercambridgeplanning.org>
Subject: Re: s.73 application Fews lane

Dear Mr Reid,

Paragraph 13 of the judicial review pre-action protocol states that:

“Requests for information and documents made at the pre-action stage should be proportionate and should be limited to what is properly necessary for the claimant to understand why the challenged decision has been taken and/or to present the claim in a manner that will properly identify the issues. The defendant should comply with any request which meets these requirements unless there is good reason for it not to do so. Where the court considers that a public body should have provided relevant documents and/or information, particularly where this failure is a breach of a statutory or common law requirement, it may impose costs sanctions.”

Section 100D(1) of the Local Government Act 1972 requites that a list of background papers that disclose any facts or matters on which a report or a part of a report is based and have been relied upon to a material extent in the preparation of said report.

In respect of decision 20/02453/S73, the Council failed to comply with
this statutory requirement. Had the Council done so, this email seeking information on the decision would not be necessary.

Paragraph 13 of the officer’s report states that, “1.5m pedestrian visibility splays are available within the adopted highway at the junction of Fews Lane with the High Street”.

Could I please ask the Council to clarify the source of information upon which the above statement is based?

If the Council declines to respond to this query, this is likely to be drawn to the attention of the court in relation to the issue of costs.

Kind regards,

Daniel Fulton
Director

Fews Lane Consortium Ltd
The Elms
Fews Lane
Longstanton
Cambridge
CB24 3DP

tel. 01954 789237

On 4 Jun 2021, at 11:31am, Stephen Reid <Stephen.Reid@3csharedservices.org> wrote:

Dear Fews Lane Consortium Limited

I am instructed to write and acknowledge receipt of the three attached emails received from you this week but also to advise that the Council does not at this stage intend to provide a more substantive response to those emails .

I can also confirm that I am instructed that it is the Council's intention to strenuously resist any application for Judicial Review of the recent decision of the Planning Committee as to the s.73 application under reference 20/0245/S73.

Stephen Reid
Senior Planning Lawyer
3C Shared Services – Legal Practice
<image001.png>
Telephone: 01223 457094/07817 730893
Email: stephen.reid@3csharedservices.org

Main Office Address: South Cambridgeshire Hall, Cambourne Business Park, Cambourne, Cambridge, CB23 6EA

3C Shared Services is a strategic partnership between Cambridge City Council, Huntingdonshire District Council and South Cambridgeshire District Council

<Mail Attachment.eml><Mail Attachment.eml><Mail Attachment.eml>

From: Stephen Reid <Stephen.Reid@3csharedservices.org>
Sent: 04 June 2021 13:05
To: Stephen Reid <Stephen.Reid@3csharedservices.org>
Subject: FW: S.73 response

Stephen Reid
Senior Planning Lawyer
3C Shared Services – Legal Practice

Telephone: 01223 457094/07817 730893
Email: stephen.reid@3csharedservices.org

Main Office Address: South Cambridgeshire Hall, Cambourne Business Park, Cambourne, Cambridge, CB23 6EA

3C Shared Services is a strategic partnership between Cambridge City Council, Huntingdonshire District Council and South Cambridgeshire District Council

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From: Stephen Reid
Sent: 14 May 2021 16:17
To: Daniel Fulton <dgf@fewslane.co.uk>
Cc: Kelly Stephen <Stephen.Kelly@greatercambridgeplanning.org>; Sharon Brown <Sharon.Brown@greatercambridgeplanning.org>; Toby Williams <Toby.Williams@greatercambridgeplanning.org>; Lewis Tomlinson <Lewis.Tomlinson@greatercambridgeplanning.org>
Subject: FW: S.73 response

Dear Fews Lane Consortium Limited

I am instructed to email you the attached.

I will make arrangements for a hard copy to be sent in the post to you but please note this will not be until next week.

Stephen Reid

3C Shared Services
PO Box 700, Cambridge CB1 0JH

Fews Lane Consortium Limited

Date:14th May 2021

Dear Sirs

Proposed claim for judicial review in relation to prospective planning permission 20/02453/s73 and 20/05101/FUL

We write in relation to your pre-action protocol letter dated 30th April 2021 in which you indicate your intention to challenge by way of judicial review the Council's decision to entertain planning applications under ref 20/02453/s73 and 20/05101/FUL

The Prospective Claimant

1 The Prospective Claimant would be Fews Lane Consortium Limited.

The Prospective Defendant

2 The Prospective Defendant is South Cambridgeshire District Council.

Correspondence should be addressed to:
3C Shared Services – The Legal Practice
South Cambridgeshire Hall
Cambourne Business Park
Cambourne
Cambridge CB23 6EA

The Solicitor dealing with the conduct of this matter is Stephen Reid.

Response to the claim

3 The first matter that I would draw to your attention is that the application under reference 20/05101/FUL is now the subject of an appeal (for non-determination) and whilst the Council is waiting to be advised as to the allocation of an Appeal Inspector the Council's position is that this application is no longer within its jurisdiction as Local Planning

Authority and therefore it is intended that this response letter will only address matters in relation to the application under planning reference 20/02453/s73.

4. You will recall that Fews Lane Consortium Limited had previously issued a Pre Action Protocol letter dated 27th July 2020 in relation to the application under 20/02453/s73 and where a response was sent dated 18th August 2020 and therefore in the first part of this response I intend to again address a number of points as set out in that response.

5 In the second part of this response I intend to then seek to address matters which have arisen post 18th August where I believe them to be relevant.

6 However, before moving to the first part of the response there is an initial point that I would like to highlight namely that the Council received an email from Mr Caddoo dated 21st August 2020 in which he asked the Council to accept the email as "..confirmation on behalf of the applicant, Landbrook Homes Ltd, that the S.73 application under 20/02453/s73 is in relation to the same red line location plan submitted under planning reference S/0277/19/FL…"

FIRST PART

7 Your claim challenges a section 73 application under planning reference 20/02453/s73 (the "s.73 Application") in relation to the grant of planning permission for the erection of 2 dwellings with parking.

8 The principles on which a claim for judicial review of a decision to grant planning permission may be brought have been shortly stated by Lord Justice Lindblom in Mansell v Tonbridge and Malling BC [2017] EWCA Civ 1314 at paragraph 42. We do not set out these fundamental principles in full in this letter but they are referred to where appropriate below.

9 While your letter of 30th April 2021 makes various assertions by way of complaint about the omission of visibility splays it is felt the Consortium has failed to substantiate how an alleged error of law will arise.

10 The Council has noted earlier complaints on a similar matter in relation to a planning application for development in Waterbeach. In response to that complaint, the Council sought advice from Counsel and responded to the consortium. The Council's advice from Charles Streeton of Counsel on that matter was provided to the Consortium.

11 Turning to the points made at paragraph 10 of your letter dated 27th July 2020, and which is set out below for ease of reference.

"..(10) The question of whether or not visibility splays are required in order for the proposed development to be acceptable in planning terms is a matter of planning judgment that is within the purview of the decision maker. However, pursuant to section 327A of the 1990 Act, the Council does not have the discretion to decide that it will entertain an application that fails to comply with a requirement as to the form or content of any document which accompanies the application…"

12 The basis of the Consortium's proposed claim is an allegation that any decision to grant planning permission for the Development pursuant to the S.73 Application would not accord with the requirements imposed by the Town and Country Planning (Development Management Procedure) (England) Order 2015 ("the **2015 Order**") and thus would also be in breach of section 327A of the Town and Country Planning Act 1990 ("the **1990 Act**"). It appears alleged that the land outlined in red on the location plan for

S/0277/19/FL does not include all of the land necessary to carry out the proposed development as it does not include all of the land required for visibility splays.

13 In relation to a similar point raised by the Consortium albeit on a completely different site and in a completely different location Charles Streeten of FTB has advised that for the reasons set out further below he was of the opinion that:

a The Council granting planning permission for development which relies on adopted highway land outside the red line site boundary as part of the visibility splays is not in breach of the requirements of the 2015 Order.

b Provided land on which any operational development will take place is within the red line boundary, and the remaining land is adopted highway, Mr Streeten is of the view that the requirements of the 2015 Order will be complied with and it is not necessary to include in the red line boundary all of the land required as visibility splay where such land is part of the adopted highway.

c Even if he is wrong in relation to the above, the prospect of a claim for judicial review succeeding in the case where he was asked to advise was low. Given the similarities of that matter and the current complaint, the Council is of a similar opinion in relation to the S.73 Application not least having regard to the confirmation referred to at paragraph numbered 6 above.

14 **LAW**

The Statutory Scheme

14.1 The 2015 Order is made, inter alia, pursuant to section 59 of the 1990 Act. It dictates the procedure by which planning applications must be determined.

14.2 Section 327A of the 1990 Act states:

"(1) This section applies to any application in respect of which this Act or any provision made under it imposes a requirement as to—(a) the form or manner in which the application must be made; (b) the form or content of any document or other matter which accompanies the application.

(2) The local planning authority must not entertain such an application if it fails to comply with the requirement."

14.3 A local planning authority should not entertain an application for planning permission unless it complies with the requirements of the 2015 Order but please note the comments under paragraphs numbered 12 and 22 below.

15 **Non-Compliance with the DMOP**

15.1 It should, however, be noted that notwithstanding the apparently strict wording of section 327A, the High Court has made clear that a breach of the requirements in the 2015 Order does not, necessarily, mean that a grant of planning permission will be quashed (see R (Bishop) v Westminster CC [2017] EWHC 3102 (Admin) at para. 23). Rather, the court retains its discretion regarding whether or not to quash a planning permission granted in breach of the 2015 Order. Indeed, in a case where it is 'highly likely' that the outcome would not have been substantially different absent the error, the court is under a duty pursuant to section 31 of the Senior Courts Act 1981 (as amended) to refuse both permission for judicial review and relief.

16 **Article 7 of the 2015 Order**

16.1 Article 7 of the 2015 Order is entitled "General requirements: applications for planning permission including outline planning permission". Article 7(1)(b) requires that an application for planning permission must "include the particulars specified or referred to in the form". It should also be noted that Article 7(1)(c) requires the application be accompanied inter alia by (i) a plan which identifies the land to which the application relates; (ii) any other plans, drawings and information necessary to describe the development which is the subject of the application.

16.2 The section of the application form to which the Consortium referred to in the letter of 27th July 2020 reads as follows:

"The application site must be edged clearly with a red line on the location plan. It should include all land necessary to carry out the proposed development (e.g. land required for access to the site from a public highway, visibility splays (access around a road junction or access, which should be free from obstruction), landscaping, car parking and open areas around buildings)."

17 This is also reflected in the Government's Planning Practice Guidance ("**PPG**") which says at reference ID 14-024-20140306:

"The application site should be edged clearly with a red line on the location plan. It should include all land necessary to carry out the proposed development (eg land required for access to the site from a public highway, visibility splays, landscaping, car parking and open areas around buildings). A blue line should be drawn around any other land owned by the applicant, close to or adjoining the application site."

18 In interpreting these words Mr Streeten has advised that it is important not to lose sight of their context. They have not been drafted as would a policy, still less with the care given to the drafting of legislation. In both cases are intended as practical guidance to those completing an application for planning permission. They should therefore be read with a considerable degree of common sense and not subjected to exegetical legal analysis. If authority is required for this proposition, it is to be found in R (Solo Retail Limited) v Torridge DC [2019] EWHC 489 (Admin) at para. 33.

ANALYSIS

19 The particular point at issue is the location of any visibility splays required to ensure the access to the Development is safe. In relation to the visibility splays for the junction of Fews Lane and High Street Longstanton all the land outside the red line boundary covered by those visibility splays is within the existing adopted highway. The Highway Authority officers have confirmed their view that no other land is required to secure the necessary visibility for this development.

20 The issue, therefore, is whether planning permission for the Development can be granted pursuant to the S.73 Application, notwithstanding that an area included within the visibility splay is on adopted highway outside the red line boundary. The view of the Council is that it can:

20.1 Firstly, the text of both the application form and the guidance refers to "all land necessary to carry out the proposed development". Mr Streeten's has expressed a view that the word "development" is of central importance. If land is not being developed, it does not need to be included within the red line boundary. Thus, although land that is not adopted highway such that its use needs to be changed to be used as a visibility splay may need to be shown within the red line

boundary. Where, however, the land used for the visibility splay is already adopted highway, and no operational development is required, it does not need to be included within the red line.

20.2 Secondly, Mr Streeten has advised that an over literal reading of the application form and PPG would create absurd results. As I have pointed out to you in the past, both refer to car parking and open areas around buildings. If, however, the development proposed does not include any car parking it plainly would not be invalid if the red line on the location plan did not show land for car parking which is not being provided or required. Similarly, if the application was such that the footprint of a proposed building meant there were to be no open areas around it, the effect of the application form is clearly not intended to be that the application is invalid because it fails to show any open areas. On the contrary, as both the form and the PPG make clear, the references given are mere examples, and are not intended to be prescriptive or exhaustive. Ultimately, what land is necessary to carry out the proposed development will be a matter of judgement for the local planning authority to determine on the facts of any given case.

21 Mr Streeten, as a caveat to the above (and leaving aside the questions which arise where works are carried out pursuant to an agreement under section 278 of the Highways Act 1980), advised in relation to the other matter that if operational development such as engineering works are required to provide or alter an access, this may amount to development and should, therefore, be included within the red line boundary.

22 Applying these principles, Mr Streeten expressed an opinion as set out below (in the case where he was asked to advise) :

22.1 Provided that all of the relevant land upon which works to create the access for the Development fall within the red line boundary, the Council would be entitled to conclude that the land necessary to carry out the proposed development does not include land falling within the visibility splays but outwith the red line boundary, which is adopted highway.

22.2 Provided that the red line boundary includes the land upon which operational development is required to provide the access, it is not necessary to include within the red line boundary other land which is adopted highway and forms part of the relevant visibility splay.

23 In the other case, Mr Streeten advised that even if he is wrong, he is of the view that the prospects of bringing a successful claim for judicial review in that case would be low and he cannot see what prejudice could be said to result from not including adopted highway land forming part of the visibility splay within the red line boundary for the development. His view was that he felt a claim for judicial review would be likely to be refused permission and/or relief pursuant to section 31 of the Senior Courts Act 1981 on the basis that it is highly likely the outcome would not have been substantially different absent any error of law identified. The same point is considered by the Council to apply here.

24 In any event, even if (which is denied) there was some error in the validation process, the Court has a discretion whether or not to quash a grant of planning permission, depending on a variety of factors, including:

- the consequences of non-compliance,
- the nature of the failure,
- the identity of the applicant for relief,

- the lapse of time ,and
- the effect on other parties

25 The Consortium have (in the other case where Mr Streeten has advised) suggested that:

"… It is difficult to see how anyone's interests could be prejudiced by the Council insisting that the entire 43 metre x 2.4 metre visibility splays are included within the red line boundaries of the application site, the appropriate notices being served upon the owners of land within the application site, and the appropriate ownership certificate being filed by the applicant…."
It is the Council's view that this suggestion as to extent of the red line boundaries is not the relevant legal test as to whether an application is valid

SECOND PART

26 Officers are of the view that the change sought under the s.73 Application makes no material changes to the actual development proposed and the purpose of the new condition is solely to make detailed provision for construction traffic.

27 Officers are mindful that an approval of a s.73 application results in a new planning permission and not an amendment of the original. Further, whilst the guidance quoted in paragraph 21 of the Officer's Report presented to Planning Committee in [January 2021] is correct to limit attention to conditions that are the subject of the application, officers are also mindful of the need to consider whether any material change of policy or other circumstances which might require a re-assessment of other conditions or, indeed, the development as a whole, see R v Stefanou v Westminster City Council & Ano [2107] EWHC 908 (Admin) at [90].

28 Officers are mindful of the complaints which refer to the inadequacies of the site plan supplied with the original application – but it is submitted it is too late to challenge the validity of the permission pursuant to that original application. Fews Lane Consortium Limited at least at one stage sought to suggest a plan is required by reference to the article 7(1)(b) – which requires particulars to be included as specified in the application form but as a simple matter of statutory interpretation the Council's position is that cannot include a plan which is dealt with separately and expressly by (c).

29 It follows that officers do not consider it is necessary to request a further plan, as indicated in paragraph 3 of the response dated 18th August 2020 but please note reference to confirmation under paragraph numbered 6 above

30 Whilst there has been some debate as to whether pedestrian splays need to be 1.5m x 1.5m or 2m x 2m, it is the Council's position that 1.5m is the correct figure (see points 14 and 15 and 21.3 of a Cambridgeshire County Council letter dated 12th December 2018 but apparently dealing with the same junction – Fews Lane and High Street,

31 There is a further point namely whether all the land required for such splays is on highway land. There is an email from Jon Finney dated 6th January 2021 in which he confirms that it is all on highway land. This is consistent with earlier comments to the same end, and the later email from Jon Finney on the same date confirms this position even though the relevant land is not shown on the highways register. The land forms part of a grass verge.

32 Please correct me if I am wrong but isn't it the contention of Fews Lane Consortium Limited that such land should still have been shown as included within the application site by reference to the statutory provision for operational development on highway land. If that is the contention, then it is the Council's position that any such contention misses

the point as there is no operational development proposed for these visibility splay areas and as it is highway land its use as visibility splays involves no change of use.

33 In his letter Mr Streeten dated 20th July 2020 covered this particular point at paragraph 16(c). With respect to subsequent arguments made by Fews Lane Consortium (e.g. as developed at paragraphs 33-34 of your letter of 8th September 2020) it is the Council's position that these ignore the distinction between operational development on highway land and change of use.

34 Given, as noted above, there is no express requirement for a site location plan (identifying the land to which section 73 application relates) and the proposed change of one condition does not relate to visibility splays, it is the Council's position that any challenge in relation to the s.73 Application is one which is unlikely to succeed

35 Notwithstanding what Fews Lane say as to the apparent stringent terms of section 327A of the 1990 Act, the Court will still have a discretion as to whether or not to quash. Mr Streeten deals with this in his Advice (at paragraph 7), and I would add to the case references made by Mr Streeten reference to the case of Maximus Networks Ltd v SSCLG and Southwark LBC and LH Hammersmith and Fulham [2018] EWHC 1933 (Admin) at [24-26]

36 Whilst in paragraph (18) of your letter dated 30th April 2021 you have said as set out below it is the Council's position that when a fresh report is taken to Planning Committee as to the sS.73 Application it will address the extent of the red line for the purposes of the s.73 Application and the need for any visibility splays and where they are located if outside of the red line

"(18) However, in this case, the prospective defendant has decided to entertain purported planning applications where that land necessary for visibility splays has been specifically excluded from the application site in contravention of the requirements of the 2015 Order. This effectively prevents a condition for adequate visibility splays from being attached to any permission granted…"

37 Officers are satisfied that the Application under reference S/0277/19/FL and the associated committee report considered representations concerning the adequacy of the access to the plot, proposed improvements including the widening of the Fews Lane access, visibility splays and the extent of the red line. Fews Lane Consortium are asked to acknowledge that the permission granted pursuant to that application can no longer be judicially challenged.

38 Notwithstanding that the s.73 Application seeks to amend only the Traffic Management Plan, the officer report to be presented to Planning Committee before determination of the S.73 Application will consider the representations of Fews Lane Consortium Limited , the necessity and reasonableness of requiring upgrades to Fews Lane through the S73 Application including the provision of visibility splays.

39 Officers of the Council are satisfied that as the local Planning Authority it does have jurisdiction to entertain the S73 Application and for all of the reasons set out or referred to above, the Council will resist any application for judicial review.

40 The Council has noted that the Consortium has not indicated if it would prefer to resolve the dispute without the need for legal proceedings or whether the Consortium would agree to participate in an appropriate form of ADR. In the other case referred to above, the Consortium were sent a copy of the advice from Mr Streeten and the Consortium were invited to take their own advice from counsel so that any points in such an advice could be put to Mr Streeten for him to review. It is not clear if such advice has been

sought by the Consortium, notwithstanding the Council's invitation and in these circumstances the Council reserves the right to bring to the Court's attention the invitation which was made in such regard . The Council is also mindful that in a conversation on 20th April 2021 Mr Fulton said that he had received written "legal advice" and which "legal advice" he said he would share it with Council the same day but a copy of that "legal advice" has never been forthcoming.

41 Finally, the Council agrees that the applicant for the S.73 Application , Landbrook Homes Ltd , would be an interested party in respect of any claim.

Yours faithfully

Stephen Reid
Senior Planning Lawyer
acting for South Cambridgeshire District Council

Tel: 01223 457094
Email: stephen.reid@3csharedservices.org

IN THE HIGH COURT OF JUSTICE **Claim No.CO/2372/2021**

QUEEN'S BENCH DIVISION
PLANNING COURT IN THE ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN
(on the application of FEWS LANE CONSORTIUM LTD) Claimant

and

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL Defendant

and

LANDBROOK HOMES LTD Interested Party

Exhibit 16
Email from Daniel Fulton to Stephen Reid
dated 28.07.2021 @ 8.32pm

[redacted]

From: Daniel Fulton <dgf@fewslane.co.uk>
Sent: 28 July 2021 20:32
To: Stephen Reid <Stephen.Reid@3csharedservices.org>
Cc: Sharon Brown <Sharon.Brown@greatercambridgeplanning.org>; Stephen Kelly <Stephen.Kelly@greatercambridgeplanning.org>
Subject: Re: Further information on decision 20/02453/S73 (Second time of asking)
Importance: High

Dear Mr Reid,

Could I please ask for confirmation that you have received this email and a date by which the Council will respond?

In addition, although presently blocked from accessing the planning register, I have been unable to find any other officer's report in which the approach taken in the by the Council's in regards to s. 73 in decision 20/02453/S73 was taken. This decision appears to have been the only instance in which the Council interpreted section 73 in this manner.

If there are other decisions in which section 73 was interpreted in the same manner, could the Council please disclose them?

Could you also please clarify why the Council chose to interpret section 73 in the manner it did in this application when it has apparently not done so in other similar recent applications?

Did the Council take into consideration other recent decisions issued under section 73 or consider whether its approach was consistent?

If the Council has not fully clarified these matters and provided the requested disclosure by the date of its acknowledgment of service, appropriate urgent applications will be filed with the court.

The Consortium will not allow the Council to deny the Consortium a fair opportunity to obtain permission on the basis of the papers by withholding information and documents about its decision making process.

Kind regards,

Daniel Fulton
Director

Fews Lane Consortium Ltd
The Elms
Fews Lane
Longstanton
Cambridge
CB24 3DP

tel. 01954 789237

On 21 Jul 2021, at 9:08am, Daniel Fulton <dgf@fewslane.co.uk> wrote:

Dear Mr Reid,

I am writing to again request clarification on aspects of the Council's reasoning in regards to planning decision 20/02453/S73. This the second time of asking.

I have rephrased these questions to try to make them as direct as possible.

Paragraph 13 of the officer's report states that: "The pedestrian visibility splays available accord with the minimum recommendation of a 1.5m splay which is understood to be derived from a previous version of The Design Manual for Road[s] and Bridges".

• Why did the Council decide to use the Design Manual for Roads and Bridges in the planning assessment of the junction of Fews Lane and High Street?

• Can the Council identify any other instances in the past one year or past five years in which the Council used the Design Manual for Roads and Bridges in the planning assessment of a residential access road within the district?

• If there are any such instances, could the Council please provide application reference numbers for those applications?

Thank you very much for your assistance.

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IN THE HIGH COURT OF JUSTICE **Claim No.CO/2372/2021**

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and

SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL Defendant

and

LANDBROOK HOMES LTD Interested Party

Exhibit 17
Email from Daniel Fulton to Stephen Reid
dated 01.08.2021 @ 3.57pm

[redacted]

Stephen Reid
Senior Planning Lawyer
3C Shared Services – Legal Practice
Telephone: 01223 457094/07817 730893
Email: stephen.reid@3csharedservices.org

Main Office Address: South Cambridgeshire Hall, Cambourne Business Park, Cambourne, Cambridge, CB23 6EA

3C Shared Services is a strategic partnership between Cambridge City Council, Huntingdonshire District Council and South Cambridgeshire District Council

---

From: Daniel Fulton <dgf@fewslane.co.uk>
Sent: 01 August 2021 15:57
To: Stephen Reid <Stephen.Reid@3csharedservices.org>
Cc: Stephen Kelly <Stephen.Kelly@greatercambridgeplanning.org>; Sharon Brown <Sharon.Brown@greatercambridgeplanning.org>
Subject: Re: Further information on decision 20/02453/S73 (Second time of asking)

Dear Mr Reid,

The Fews Lane Consortium has been waiting patiently for the Council to provide information concerning its decision making process on application 20/02453/S73 and requested disclosure since the pre-action phase of claim CO/2372/2021.

Could you please confirm if it is the council's intention to file and serve its acknowledgment of service without providing the outstanding requested information and the outstanding requested disclosure?

I will also note that the Fews Lane Consortium has been unable to search for related decision in the public planning register due to the Council's installation of software that blocks certain users from access the planning register. This has had the effect of precluding the Consortium from being able to consider certain grounds in regards to consistency of decision making. This otherwise would have been possible if not for the Council's continuing breach of its obligations under article 40 of the Town and Country Planning (Development Management Procedure) (England) Order 2015.

If the Council requires more time to respond to the requests for information and disclosure and

prepare its acknowledgment of service, the Fews Lane Consortium would be agreeable to an application for a reasonable extension of time for the Council.

If the Council does not wish to apply for an extension of time for the acknowledgment of service, the Consortium anticipates that there will be a need for a number of contentious applications in regards to requests for further information and disclosure. This is likely to significantly increase the overall costs of the proceedings.

The Consortium considers that the Council has only remote prospects of success in this claim, and those prospects are likely to be further diminished once all the facts of the claim are on the table. In light of these circumstances, we hope that the Council will give thoughtful consideration to agreeing to quash the impugned decision by consent before further legal costs are incurred.

Kind regards,

Daniel Fulton
Director

Fews Lane Consortium Ltd
The Elms
Fews Lane
Longstanton
Cambridge
CB24 3DP

tel. 01954 789237

On 29 Jul 2021, at 1:32pm, Stephen Reid <Stephen.Reid@3csharedservices.org> wrote:

Dear Fews Lane Consortium Limited

I acknowledge receipt of your email sent at 20:32 yesterday.

At this stage I am not able to give you a date by which the Council will respond.

When I receive instructions as to your email it would be my intention to respond further.

Stephen Reid
Senior Planning Lawyer
3C Shared Services – Legal Practice

Telephone: 01223 457094/07817 730893
Email: stephen.reid@3csharedservices.org

Main Office Address: South Cambridgeshire Hall, Cambourne Business Park, Cambourne, Cambridge, CB23 6EA

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• Can the Council identify any other instances in the past one year or past five years in which the Council used the Design Manual for Roads and Bridges in the planning assessment of a residential access road within the district?

• If there are any such instances, could the Council please provide application reference numbers for those applications?

Thank you very much for your assistance.

Kind regards,

Daniel Fulton
Director

Fews Lane Consortium Ltd
The Elms
Fews Lane
Longstanton
Cambridge
CB24 3DP

tel. 01954 789237

Neutral Citation Number: [2014] EWHC 4325 (Admin)

Case No: CO/3184/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 19th December 2014

Before :

MR JUSTICE HOLGATE

- -

Between :

The Queen on the application of Luton Borough Council	**Claimant**
- and -	
Central Bedfordshire Council	**Defendant**
Houghton Regis Development Consortium	**Interested Party**

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Peter Village QC and Andrew Tabachnik (instructed by **Winckworth Sherwood LLP**) for the **Claimant**
Saira Kabir Sheikh QC (instructed by **Central Bedfordshire Council**) for the **Defendant**
Robin Purchas QC and Hugh Richards (instructed by **King and Wood Mallesons LLP**) for the **Interested Party**

Hearing dates: 2, 3 and 4 December 2014

Judgment
As Approved by the Court

Mr Justice Holgate:

1. On 2 June 2014 Central Bedfordshire Council ("CBC") granted planning permission to the Houghton Regis Development Consortium, the First Interested Party for a substantial urban extension on 262 hectares of Green Belt land on the Houghton Regis North Site 1 ("HRN1"). The second to fifth interested parties are members of the consortium. In this judgment I will refer to the interested parties collectively as the "IP".

2. The permission was granted in outline, with details of access, appearance, landscape, layout and scale reserved for subsequent approval. The outline consent authorises a large scale development which includes up to 5,150 dwellings and up to 202,500 sq m gross of development in the classes A1 to A3 (retail), A4 (public house), A5 (take away), B1, B2, B8 (offices, industrial and storage and distribution), C1 (Hotel), C2 (care home), D1 and D2 (community and leisure) and other uses. According to the schedule of development parameters, the scheme includes (in addition to 25,000 sq m of B2 and 125,000 sq m of B8) up to:-

    - 5000 sq m of B1 offices

    - 10,000 sq m for a main food store, 2,500 sq m of food retail, 12,500 sq m of comparison retail and 5,000 sq m of A2 to A5 uses

    - A hotel of 3,000 sq m

    - 40,000 sq m of D1 (non-residential institutions)

    - 5,000 sq m of D2 space (including a cinema of up to 3,000 sq m)

3. The planning permission was accompanied by a section 106 obligation also dated 2 June 2014. Clause 5 and the fourth and ninth schedules imposed an obligation on those interested in the development site to provide a minimum of 10% of the total number of dwellings as "affordable housing dwellings". But it is common ground that the obligation may require up to 30% of the total number of dwellings to be provided as affordable units, pursuant to a review mechanism based upon the sales figures actually achieved.

4. On 10 July 2014 Luton Borough Council ("LBC"), an adjoining local planning authority, filed a claim for judicial review. Singh J ordered that the application for permission be adjourned to an oral hearing. On 9 September 2014 Supperstone J gave directions for the application to be dealt with at a rolled up hearing, which took place before me on 2 to 4 December 2014.

5. CBC's decision is of great importance to LBC. The Luton/Dunstable/Houghton Regis "conurbation" has been surrounded by a tight Green Belt boundary since 1980, which has constrained peripheral expansion. LBC is unable to find land within its own administrative area to meet all of its housing needs, a significant proportion of which is for affordable dwellings. LBC has therefore been co-operating with neighbouring authorities, including CBC, in order that some of its needs is met within other areas. Approximately 80% of LBC's administrative boundary is shared with CBC on its northern, western and southern sides.

6. Although the grounds of challenge ranged over a number of subjects, Mr Peter Village QC, who appeared on behalf of LBC, confirmed that his client would not have challenged the permission, if it had secured a higher minimum level of affordable housing acceptable to that authority. In this context I also note that any earlier objections to LBC's standing were not pursued at the hearing.

Protective Costs Order

7. In the Claim Form LBC sought to rely upon the Aarhus Convention, the protective costs regime in Section VII of CPR 45 and the related costs limits in the Practice Direction. In its Acknowledgement of Service CBC disputed that the Convention applied to this claim. This issue was to have been dealt with in the hearing before me. Shortly beforehand, the decision of the Court of Appeal in Secretary of State for Communities and Local Government ("SCLG") and Venn [2014] EWCA Civ 1539 was handed down. As a result, Ms. Saira Kabir Sheikh QC, who appeared on behalf of CBC, accepted that most of the grounds raised by LBC fell within the scope of environmental matters. But there remained an issue as to whether the Convention or CPR 45.44 provides protection to planning authorities in the position of LBC.

8. However, on the second day of the hearing the LBC and CBC resolved this difference by agreeing that an order should be made imposing a cap of £0 on their respective costs. I will reflect that agreement in the formal order of the Court.

9. It is essential to consider the grounds of challenge in context and so I will first summarise matters under the following headings before going on to deal with the 10 grounds broadly in the sequence in which they were argued The cross-references are to the relevant sections of this judgment:-

- Evolution of planning policy (paras. 10-35)
- The 2012 planning application for HRN1 (para. 36)
- The A5/M1 link road and the Woodside link road (paras. 37-40)
- Overview of the 10 grounds of challenge (para. 41)
- LBC's representations to CBC on Houghton Regis North (paras. 42-64)
- The Officers' Reports on the planning application (paras. 66-89)
- Legal principles for reviewing decisions taken by a local planning authority (paras. 90-98)
- Ground 1 (paras. 100-111)
- Ground 4 (paras. 112-119)
- Ground 3 (paras. 120-136)
- Ground 5 (paras. 137-140)
- Ground 2 (paras. 141-161)

- Ground 6 (paras. 162-163)
- Ground 8 (paras. 164-169)
- Ground 7 (paras. 170-196)
- Ground 9 (paras. 197-207)
- Ground 10 (paras. 208-210)

Evolution of planning policy

10. In 1980 the HRN1 site was included in the Green Belt upon the approval by the Secretary of State of the Bedfordshire County Structure Plan.

11. The Bedfordshire and Luton Strategic Housing Market Assessment ("SHMA") published in March 2010 assessed housing market needs for the period 2001–2021. It assessed the position in both Luton Borough and the southern part of Central Bedfordshire together and indicated that 7,700 social rented housing and 3,200 intermediate affordable housing units would be required out of a total of 21,600 dwellings.

12. The 2010 SHMA was updated in a document issued in June 2014 so as to cover the period 2011–2031. This was prepared in the context of the duty on both authorities to cooperate, imposed by S33A of the Planning and Compulsory Purchase Act 2004 (which had been inserted by the Localism Act 2011 – "the duty to cooperate"). Paragraph 32 explained that the authorities would focus the overall assessment of housing need upon the whole of their respective administrative areas. In summary, Luton Borough was assessed as having an overall housing requirement over the period 2011-2031 of 17,800 units, of which about 28.4% would need to be affordable dwellings. For Central Bedfordshire the SHMA stated that 25,600 dwellings should be provided over the period, of which 34.8% should be affordable dwellings. In addition, the Claimant states that the capacity assessments it has carried out for its own area show that only about 6000 new homes can be provided within Luton in the period to 2031, therefore leaving a very substantial proportion to be accommodated outside LBC's area.

Regional Planning Guidance for the South East (RPG 9) - 2001

13. In tracing the evolution of planning policies, it is necessary to go back to March 2001 when the Regional Planning Guidance for the South East ("RPG9") was issued. As paragraph 8 of the Claimant's skeleton states, at that stage HRN1 lay within a broader area described as a Priority Area for Economic Regeneration ("PAER"). Paragraphs 4.15 to 4.17 of the document explained why the PAERs were needed. The criteria for designation included above average unemployment rates, high levels of social deprivation, low skill levels, dependence on declining industries and derelict urban fabric. Dedicated *regeneration* strategies were said to be needed in order to tackle the problems of each PAER and to maximise the contribution of each area to the social and economic wellbeing of the region. In the list of PAERs there was included Luton Dunstable and Houghton Regis.

14. As regards Green Belts, paragraph 6.5 stated the Government's then view that there was not a *general* case for reviewing existing Green Belt boundaries, but added that where settlements are tightly constrained by the Green Belt, then local circumstances might indicate the need for a review after carrying out urban capacity studies.

15. Paragraphs 12.35 to 12.41 of RPG9 dealt specifically with Luton, Dunstable and Houghton Regis. Even at that stage it was recognised that although the area had good north south strategic routes, "east-west communications are poor and would benefit from enhancement" and "there is also severe congestion on the local road network". Paragraph 12.38 pointed out the problems caused by the area's dependence on its former manufacturing base and the need for major economic restructuring and regeneration in order to diversify the employment base. Paragraph 12.40 pointed out that the towns are amongst the most densely populated outside Greater London and are tightly constrained by the Green Belt. Paragraph 12.41 required joint working to (inter alia) develop complimentary strategies through development plans which, in particular, would encourage development proposals and land uses contributing to economic restructuring and sustainable urban regeneration.

South Bedfordshire Local Plan Review - 2004

16. On the 27th January 2004 CBC adopted the South Bedfordshire Local Plan Review (2004). Policies GB1 and GB2 applied traditional Green Belt restraint policies to the designated Green Belt, including HRN1.

Milton Keynes and South Midlands Sub-Regional Strategy - 2005

17. The approach set out in RPG9 was taken further in Milton Keynes and South Midlands Sub-Regional Strategy published in March 2005 ("the Sub-Regional Strategy"). This strategy was based upon a prior study which had assessed four options for distributing growth across the area. The study preferred an option which included the focussing growth on the Luton-Dunstable-Houghton Regis area. The sub-regional strategy's objectives included a major increase in the number of new homes in the sub-region, meeting the need for affordable housing and a range of types and sizes of market housing, together with *a commensurate level of economic growth* and developing skills in the work force (paragraph 14).

18. For Luton, Dunstable and Houghton Regis the emphasis was to be on building the principal growth towns into vibrant communities with a major improvement in the local economy and skills base and capacity to meet housing need (paragraph 15). This was to be achieved through economic regeneration across the urban area. In addition the area or town known as Leighton Linslade was identified in order to provide a proportion of the growth attributable to this part of the conurbation in a complimentary manner.

19. Paragraph 79 et seq dealt with issues specific to Luton, Dunstable and Houghton Regis, pointing out that this area had coalesced into a single conurbation forming the largest urban area in Bedfordshire. Paragraph 81 referred to the substantial problems in the area regarding unemployment and the skills base with the consequent need to concentrate efforts on the continued regeneration of the economy, to achieve (inter alia) "urban renaissance". Paragraph 82 made the important statement that "while some of these aims can be met within the present confines of the urban area, others

cannot. The Green Belt forms a tight boundary all around the towns so that, in recent years, it has become increasingly difficult to meet locally-generated needs, especially for the housing of the relatively young population. Development has been diverting north of the Green Belt to other parts of Bedfordshire and beyond, sometimes to locations less inherently sustainable than Luton/Dunstable/Houghton Regis." The Sub-Regional Strategy stated that although it would be essential to release development capacity within the towns, nonetheless that would be substantially less than was necessary even to meet local needs, quite apart from securing additional regeneration and investment. Consequently, paragraph 83 stated that "these exceptional circumstances require a review of the Green Belt around Luton/Dunstable/Houghton Regis to provide headroom for potential development needs to 2031 and specifically to accommodate sustainable mixed-use urban extensions which support the continued regeneration of the existing urban area."

20. Policy 2(a) stated "the LDD should review Green Belt boundaries around the Luton/Dunstable/Houghton Regis conurbation and Leighton Linslade so that in combination sufficient land is made available the land use needs of the Sub-Regional Strategy to 2021. Subject to testing through LDDs, sufficient areas of safeguarded reserved land should also be excluded from the Green Belt to meet needs to 2031. In the case of Luton, Dunstable and Houghton Regis, the review *should focus on two areas of search* which would exclude the Chilterns AONB: *from west of Dunstable to the A6 in the north*…" (emphasis added). It is common ground that the HRN1 site, although not specifically identified or allocated in the Sub-Regional Strategy (which was not of course a site-specific document), nonetheless falls within that area of search.

East Of England Plan - 2008

21. In May 2008 the East of England Plan was published. In all material respects it incorporated and retained the relevant provisions of the Sub-Regional Strategy to which I have just referred.

Revocation of Regional and Sub-Regional Plans - 2013

22. On 3 January 2013 the East of England Plan and the Sub-Regional Strategy were revoked by the Secretary of State, as part of the revocation of regional plans generally, pursuant to powers conferred by the Localism Act 2011.

The Luton and South Central Bedfordshire Joint Core Strategy – 2011

23. In March 2011 the draft Luton and Southern Central Bedfordshire Joint Core Strategy ("Joint Core Strategy") was submitted by LBC and CBC acting jointly to the Secretary of State for independent examination by an Inspector. The extracts from that document contained in the Core Bundle are from the pre-Submission version of the plan, but I am told that there were no material differences for the purposes of this case between that version of the plan and the subsequent Submission edition.

24. Paragraph 3.13 stated that in addition to new development opportunities within the urban areas, four urban extensions would be delivered in order to meet the quantity

and rate of new housing, employment and infrastructure required. Two of those urban extensions were to be located to the north of the main conurbation, namely North of Houghton Regis and secondly North of Luton (para. 3.14). Two other extensions were proposed, including one to the east of Leighton Linslade. I am told that the whole of each of these extensions was located with the Green Belt and the area of CBC. They were said to have the potential to deliver 13,500 new homes (para. 3.29) distributed as follows: 2,500 homes at east of Leighton Linslade, 4,000 at North of Luton and 7,000 at North of Houghton Regis. Paragraph 3.30 explained that that would provide a potential oversupply of about 4,050 homes in relation to a plan period ending in 2026, but might nonetheless be released by then under a contingency plan.

25. Chapter 10 of the Joint Core Strategy dealt with the strategic site specific allocations. Paragraph 10.19 explained that for the 15 years covered by the plan period 2011-2026, North of Houghton Regis had been identified as a suitable site for the provision of 5,150 new homes, 30 hectares of new employment opportunities and associated infrastructure, plus a contingency of 1,850 additional homes and a further 10 hectares of employment land if required by future needs.

26. North Houghton Regis was proposed to be allocated as a Strategic Site Specific Allocation ("SSSA"), lying between the M1 and the A5. It was to be delivered as two sites (para. 10.20). Site 1 (in effect HRN1), the eastern part of the allocation, extended from the M1 on its eastern boundary to the A5120 on its western flank. Site 2, intended to be developed at a later stage, was bounded by the A5120 to the east and the A5 to the west. "The proposed A5-M1 link road provides the northern boundary for both sites and the Green Belt boundary will be revised to align with this." Paragraph 10.21 made it plain that the existing urban area lying to the south of the allocation would form its southern boundary and that the Green Belt would be altered in this area so as to remove land lying within the allocated area. It added "the contingency there has been included within the area will remove the need for a further review should more development be required within or beyond the period to 2026." The two sites would be "fully integrated with each other as well as with the urban area of Houghton Regis so as to provide truly sustainable development" (paragraph 10.22).

27. Policy CS 14 dealt specifically with the HRN1 site. It identified the area of the site and the proposal to revise the Green Belt boundaries so as to exclude from the Green Belt land up to the alignment of the A5-M1 link road. The Policy required a master plan to be prepared providing (inter alia) a mix of uses necessary to achieve a sustainable community including housing, employment land and supporting social, community and green infrastructure.

28. The Joint Core Strategy got as far as the examination stage in front of an independent inspector. But in September 2011 LBC withdrew its support from the plan and it was subsequently abandoned. However, it is important to note from paragraph 3.10(2) of the Officer's Report to CBC's Development Management Committee meeting held on 28 August 2013 in relation to the HRN1 planning application that "the abandoned Joint Core Strategy was *not abandoned due to any disagreement between the joint councils regarding this site*. *Its intended removal from the Green Belt and its allocation for residential and commercial development was supported by both councils at the Joint Planning Committee*" (emphasis added). Mr Village QC confirmed that LBC accepts the accuracy of that statement.

The draft Central Bedfordshire Development Strategy – 2013

29. In January 2013 the pre-submission Central Bedfordshire Development Strategy ("DS") was published. Policy 2 states that the DS plans for the delivery of a total of 28,700 new homes and 27,000 new jobs between 2011-2031. The policy envisages that some of that development will be located at North of Houghton Regis. Policy 3 proposes revisions to the Green Belt boundary so as to exclude urban extensions such as HRN. Chapter 13 of the plan deals with site specific policies.

30. Paragraphs 13.1 to 13.31 relate to the Houghton Regis North Strategic Allocation. Paragraph 13.2 indicates that a total of around 7,000 new homes can be accommodated in total: 5,500 homes on site 1 and 1,500 on site 2. About 40 hectares of employment land is provided for: 32 hectares on site 1and 8 hectares on site 2. Much of the text in paragraph 13.3 and elsewhere is similar to the draft Joint Core Strategy referred to above.

31. Policy 60 of the draft DS deals specifically with the Houghton Regis North Strategic Allocation. The court was told that the area covered by that allocation corresponds to the area of the proposed allocation in the former Joint Core Strategy.

32. I will refer only to that part of policy 60 which concerns site 1. That site again is located between the A5120 and the M1. The Policy provides for a mix of uses necessary to achieve a sustainable community, including about 5,500 private and affordable homes, 32 hectares of new employment land, commercial facilities including local centres, retail units, a food store and a public house and other related facilities. The Policy also states that Site 1 will provide opportunities to assist in "the regeneration of Houghton Regis through the timely delivery of supporting infrastructure…". Policy 60 ends by stating that the Green Belt boundary will follow the alignment of the A5-M1 link road. The Infrastructure Schedule, referred to in paragraph 13.13, identified the new Junction 11A on the M1, the A5-M1 link and the Woodside Link as "critical"

33. The DS was accompanied by a Sustainability Appraisal ("SA"). Chapter 4 of the SA explains the strategic site assessment process. The SA set out the criteria which had been employed and the range of alternative sites considered. A total of 42 sites were taken forward for more detailed examination (para. 4.6). The last paragraph 4.17 on page 90 stated that a "further factor" was the relationship between development and infrastructure, including situations "where development can be used to bring about new, or improvements to existing, infrastructure. A number of the mixed use strategic sites are all of a size and in a location that can enable infrastructure improvements to be brought about that will benefit existing residents as well as the new development. *This is particularly the case for the land North of Houghton Regis proposal, which is facilitating the development of the A5/M1 link road and the Woodside connection. These pieces of new strategic infrastructure are critical to the future success of Dunstable and Houghton Regis and the fact that the development site will help their delivery weighs significantly in favour of the proposal*" (emphasis added).

34. Paragraph 20 of the Claimant's skeleton refers to the inclusion of HRN1 in Table 6 of the SA as Site 18. It is submitted that two other sites are of particular note for the purposes of these proceedings, namely Site 8 - West of Luton and Site 27 - Marston Vale. However during the hearing, Mr Village QC confirmed that Site 27 is located

to the east of Milton Keynes and, taking into account the SA's assessment of its relationship to the housing needs covered by the plan, was of no real relevance to addressing LBC's housing requirements. As for Site 8, Table 6 noted that this site scored badly (and indeed worse than site 18) as regards Green Belt and coalescence issues. Not surprisingly, that aspect was not taken any further during the hearing.

35. Paragraph 21 of the Claimant's skeleton went on to complain that CBC had failed to comply with its duty to cooperate with LBC, under Section 33A of the 2004 Act, in relation to cross-boundary housing matters. However, Mr Village QC confirmed on behalf of LBC that the Court is not being asked to decide in these proceedings whether the duty to cooperate has been complied with. He stated that that would be a matter for future consideration by the Inspector conducting the independent examination into the draft DS. The highest that Mr Village put this aspect was that LBC's allegations concerning non-compliance with the duty should have been taken into account by CBC when assessing the weight to be given to the emerging draft DS.

The 2012 Planning Application for HRN1

36. On 24 December 2012 the HRN1 Planning Application was submitted to CBC. It was accompanied by an Environmental Statement ("ES"). The Non-Technical Summary of that ES expressly stated that the Applicant had made no assessment of any alternatives to development at HRN1 (para. 4.1). The Application was also accompanied by a Retail Assessment ("RA"). CBC commissioned an independent review of that Assessment by a specialist firm of consultants, Turley Associates ("Turleys"). The Applicant also provided a viability assessment, with a view to justifying the amount of affordable housing which could be contributed by the scheme, having regard to development and infrastructure costs. That viability appraisal was subjected to an independent review by the consultants EC Harris, instructed on behalf of CBC. Ground 7 complains about CBC's failure to make that material available to the Claimant so as to enable it to make representations thereon.

The A5-M1 link road and the Woodside link road

37. As long ago as 2001 the poor east-west communications from which the conurbation suffers had already been recognised (see para. 12.36 of RPG9). The point was taken up again in 2005 in paragraph 86 of the Sub-Regional Strategy which stated that positive action across the conurbation by Local Authorities and others is required on a number of short and medium term priorities. It made clear that the initial focus would be on such matters as ensuring the early delivery of sustainable urban extensions to complement and support the continued regeneration of existing urban areas, mainly but not exclusively, after completion of the M1 widening and the northern bypasses.

38. One of the functions of the A5-M1 link road is to serve as a northern bypass of the conurbation. The road also serves nationally and regionally important functions. Its total cost is of the order of £172 million. The Government is willing to contribute £127 million of the total cost of the scheme. However, as recorded on page 11 of the August 2013 OR, the Secretary of State for Transport had indicated his intention to approve the road should planning permission be granted for HRN1 on the basis that that site would contribute £45 million. According to the assessment by CBC, the link road would serve no purpose at all and in particular could not facilitate the HRN1 development unless constructed in its entirety; the link road cannot be delivered

without funding from the HRN1 development; and the HRN1 scheme cannot be fully developed unless the link road is in place (see for example the Officer's report to CBC's Committee meeting on 4 September 2013 – the September 2013 OR). The developers' contribution of £45 million has been secured by an agreement with the Secretary of State under Section 278 of the Highways Act 1980 dated 16 September 2011 (see paragraph 6.4 of the third witness statement of Mr Moriarty). Mr Village made it clear on behalf of the Claimant that no legal challenge is made to the legal propriety of HRN1 having been required to make a contribution to the costs of the link road on that scale.

39. The Woodside link road is intended to provide a new route between the improved Junction 11a on the M1 forming part of the A5-M1 link road scheme and the Woodside industrial estate. The object of this second link is to provide traffic from the estate with an attractive alternative route in order to gain access to the national motorway network and avoid congestion, for example, in the centre of Dunstable. The cost of the Woodside link is something of the order of £42 million. The IP will provide necessary land at no cost, but make no direct financial contribution (see para. 7.1 of Mr Moriarty's third witness statement).

40. All parties have thought it appropriate to refer to the decision of the Secretary of State for Transport dated 30 September 2014 (and therefore postdating the decision the subject of the present challenge) in which the Minister made a Development Consent Order to enable the Woodside link road to be carried out. In paragraph 34 of his decision the Secretary of State accepted that there is a compelling case in the public interest for authorising the construction of the road. In part that was based upon his conclusions in paragraph 24, where he accepted (a) that the link would make economic sense by providing a greatly improved connection between the industrial estate and the motorway network, (b) the Woodside link is critical to the successful delivery of the HRN1 development and (c) in turn that development would make a significant financial contribution to the cost of the A5-M1 link road. Paragraph 11 of the decision records that LBC supported the Woodside link road on the basis that its social and economic benefits outweighed any negative environmental impacts.

An overview of the Grounds of Challenge

41. Mr Village QC helpfully grouped the 10 Grounds of Challenge under five headings. He described the first heading as misdirections which comprised:

    i) Ground 1 – failure on the part of CBC to take into account paragraph 83 of the National Planning Policy Framework ("NPPF") to the effect that Green Belt boundaries should only be altered in exceptional circumstances and through the preparation or review of a local plan;

    ii) Ground 3 – CBC erred in attributing "substantial weight" to its emerging DS;

    iii) Ground 4 – the Officer's Report to the Committee materially misstated the treatment of the HRN1 site in previous planning policy documents;

    iv) Ground 5 – the Officer's Report improperly treated the allocation of the HRN1 site in the DS as in effect inevitable.

The second heading concerns Ground 2 and involves an allegation that CBC wrongly failed to assess alternative sites or strategies. The third heading comprises Grounds 6 and 8 which allege legal errors in the identification of "very special circumstances" in order to override Green Belt protection. The fourth heading concerns Ground 7, an allegation that CBC failed to disclose the IP's viability assessment and the appraisal of it by CBC's consultant. The fifth heading covers Grounds 9 and 10 and the alleged legal errors with regard to the application of the sequential test in paragraph 24 of the NPPF.

Representations by LBC to CBC on Houghton Regis North

42. I have already recorded the common ground in these proceedings that when the draft Joint Core Strategy was abandoned owing to disagreement between the two Local Authorities, LBC did not withdraw from the process because of any disagreement over the proposed allocation of the HRN1 Site.

43. About a year after the withdrawal from the Joint Core Strategy, CBC published on 20 June 2012 their draft development strategy for Central Bedfordshire for consultation. On 10 September 2012 the Head of Planning and Transportation at LBC produced a report for its Executive setting out that Council's Consultation Response to that draft. It stated that Luton is "likely to face an unmet need of between 5,000 to 12,000 dwellings over the next 20 years (given its estimated overall capacity within Luton of approximately 6,000 during that period)" (Summary of Comments III). LBC, recognising that the draft strategy proposed the same three urban extensions as had been previously advanced in the withdrawn Joint Core Strategy, stated that it "supports the proposed scale of urban extensions but seeks clarification of the proposed housing mix, size and tenure, and how this will address housing needs across the housing market areas…" (Summary of Comments IV).

44. LBC then added that it "urges consideration be given to looking at all possibilities for *extra growth* near to Luton, including to the west, in order to help address Luton's housing need" (Summary of Comments V – emphasis added). I cannot accept LBC's submission that this paragraph raised the possibility of an *alternative* location for growth as opposed to an *additional* location for growth, additional to the urban extensions proposed in the draft strategy (as CBC submitted). There can be no doubt about the matter, given the unequivocal statement in paragraph 15 that "in addition to the proposed urban extensions contained within the Development Strategy, Luton Borough Council urges that consideration be given to looking at all possibilities for extra growth near to Luton, including to the west, in order to help address Luton's housing need."

45. Moreover in a concluding paragraph 26, LBC stated "there is much in the proposed draft strategy to be welcomed…of critical importance will be the phasing and delivery of planned urban extensions with supporting strategic infrastructure (A5-M1 link; Junction 11a; Woodside link;…)". Paragraph 8 plainly stated that "these urban extensions are to be delivered by broadly the same strategic infrastructure investment envisaged by the withdrawn Core Strategy", i.e. the road links to which I have already referred.

46. On 7 December 2012 LBC sent a further letter to CBC enclosing the same consultation response of September that year. LBC alleged that CBC had failed to

address specific issues raised by LBC, leading to a suggestion for the first time that CBC might no longer be able to demonstrate the exceptional circumstances required to justify removing land from the Green Belt.

47. Following the submission of the HRN1 planning application to CBC on 24 December 2012, meetings took place between officers of LBC and CBC in February and March 2013 at which that application was discussed. In his witness statement Mr Trevor Holden, the Chief Executive of LBC, states that he was present at meetings that took place on 6 February and 20 March 2013. He says that LBC's concerns regarding cross-border housing provision and the HRN1 application were discussed at those meetings. LBC stated that it would require affordable housing to be delivered on the HRN1 site. CBC responded that there were viability issues within that proposal which would lead to a reduction in the amount of affordable housing that could be provided. Mr Holden states that "I recall at both meetings that I and LBC officers asked that LBC be provided with the viability evidence to support any reduced affordable housing provision on the HRN1 applications site." He does not suggest that CBC agreed to that request in those terms. Mr Christopher Pagdin, Head of Planning and Transportation at LBC, was also present at those two meetings. He states that LBC asked to "be involved in the viability appraisal work."

48. On 12 February 2013 Mr Pagdin sent a letter to CBC stating that a "key issue raised at the Leaders/Chief Executives meeting on 6 February was whether Luton residents would have equal access to any affordable housing brought forward as part of any development in close proximity to Luton, including the Houghton Regis and the North of Luton Urban Extensions." There was no suggestion in that letter that LBC had requested sight of a detailed viability appraisal or had been promised access to such material.

49. Following the meeting, on 28 March 2013 CBC sent a letter to Mr Pagdin which referred expressly to the meeting which had taken place on 20 March. Attached to the letter was the "Areas of Agreement" between the two authorities. The second topic was headed "Access to Affordable Rent Housing". Under point 1 it was agreed that CBC would provide the opportunity for Luton residents to access up to 50% of affordable rent housing provided on the two strategic allocations planned for HRN and land North of Luton.

50. The only agreement in relation to viability material upon which LBC relies is point 5 under the same heading, which stated:

> "CBC officers will arrange for LBC officers to be involved at key points in the viability appraisal work and subsequently to meet with the developers of the north of Houghton Regis strategic allocation, to discuss key issues including the opportunities to improve delivery of affordable housing on that site."

51. On 15 April 2013 a report was prepared by officers of LBC for the Council's Executive to provide its formal response to CBC's pre-submission DS and also to the planning application on HRN1. Paragraph iii of the Summary of Comments set out Luton's main concern. The Council wanted to ensure that the significant amount of development to be located close to the conurbation should be sustainable. That was

said to be necessary for several reasons. "Firstly it needs to address the social needs for affordable housing within the conurbation as a whole as set out in the jointly commissioned Strategic Housing Market Assessment. Secondly it is needed in order to demonstrate under the duty to cooperate how this development will help to address the principle element of unmet need within Luton i.e. that of affordable housing. Thirdly unless these developments address the wider needs of the conurbation including affordable housing it is considered that it will not meet the criteria for removal from the Green Belt."

52. To help put the matter into context, paragraph 11 of the Report recorded that over the planned period 2011-2031 it was likely that Luton would have a potential unmet housing need of around 4800 dwellings, and so a large proportion of that need should be met within CBC's area. LBC were also seeking contributions from other neighbouring planning authorities.

53. Paragraph v of the Summary expressed LBC's concerns as to the quantum of both convenience and comparison floor space proposed within the HRN1 application and suggested that it was significantly larger than would be appropriate for a development of this scale. The concern related to the potential for adverse economic impact upon nearby town centres.

54. In paragraph iv of the Summary LBC repeated the suggestion made in September and December 2012 that CBC consider accommodating *additional* growth to the west of Luton, but there is nothing in the text to indicate that LBC was now suggesting that this should be in *substitution* for HRN.

55. Paragraph viii of the Summary set out LBC's stance. It objected to the HRN1 application unless three requirements were satisfactorily met, the second of which is no longer relevant in these proceedings. The other requirements were (a) "ongoing negotiations over access to up to 50% of affordable housing delivered in the urban extensions of Houghton Regis and North of Luton are successful and delivering a significant quantum of affordable housing for Luton's residents" and (c) "the quantum of retail floor space to be catered within the Houghton Regis urban extension is significantly reduced."

56. On 10 June 2013 LBC wrote to CBC stating:-

> "I think we have made considerable progress in relation to a range of issues covering for instance affordable housing and transport issues and I understand we are waiting further viability work in relation to Houghton Regis (HR1) application before the discussions around affordable housing will continue."

57. As CBC and IP pointed out, no concern was expressed by LBC at that stage about any failure by CBC to comply with any alleged promise to provide a viability appraisal.

58. On 15 August 2013 CBC wrote to Councillor Timoney, the Portfolio Holder for Regeneration and the Deputy Leader of LBC. The author referred to a meeting earlier that week on 11 August and sought to confirm the issues that had been discussed and

how the two authorities might continue to move forward. The summary of the main issues discussed between the parties included the following:

> "We provided you with an update of the scheme [i.e. the HRN1 proposal], an understanding of viability issues you must consider as part of the development and the main points being raised by officers in the report to development management committee on 28 August".

59. The letter went on to make it plain that the planning application would be considered by the committee on 28 August and that papers for the meeting (i.e. the Officers' Report) would be available on CBC's website as from 14 August. In response to LBC's suggestion that it might make further representations, the letter confirmed that although any such comments would arrive too late to be dealt with in the officers' report, they would be presented to the committee if they arrived with CBC before the meeting. The letter explicitly set out the position on development viability in very clear terms (see ground 7 below).

60. In addition a further meeting had taken place on 5 August to discuss retail matters raised by LBC. The minutes of that meeting reveal that there was discussion of the retail assessment carried out by Barton Willmore, the developer's consultant. Paragraph 6 of the minutes also made it clear that there was an opportunity to discuss the independent report commissioned by CBC from Turleys on the developer's material.

61. Accordingly, from about the middle of August 2013 it was possible for LBC to consider the detailed report from officers which had been prepared for the committee meeting programmed for 28 August. There was ample opportunity for LBC to raise with CBC any matters about which it was concerned, including any lack of information or failure to take into account significant planning considerations.

62. A letter was indeed sent on behalf of LBC on 27 August, the day before CBC's committee meeting. It is noteworthy that the letter was drafted with the benefit of Counsel's advice. In summary, the letter referred back to the points put to CBC in LBC's April 2013 representations and then went on to set out LBC's "current position". It is reasonable to suppose that this letter would have set out all of those matters which LBC considered to be particularly significant at that stage. In that context I note that at the foot of the second page the author acknowledged that CBC had undertaken "extensive viability assessments and negotiations which had resulted in the HRN1 applicants offering that 10% of the houses can be delivered as affordable within the scheme, along with a potential uplift mechanism in future years should the viability of the scheme improve."

63. Despite the fact that Luton say that the current proceedings have been brought because they consider the amount of affordable housing provided by HRN1 for LBC's area to be inadequate, it is significant that no complaint was raised at all in the letter of 27 August 2013 that CBC had failed to provide LBC with viability information or to comply with the promises it had made in that respect. No explanation has been given for that omission.

64. Under the heading "Current Position" the letter of the 27 August 2013 did make other points. First, the letter stated that the amount of affordable housing which would be made available to LBC by the development was inadequate, secondly the letter argued that the development would be making a disproportionately large contribution towards the costs of the A5-M1 link and went on to suggest that if a lower sum were to be paid then more money would be available for increasing the amount of affordable housing. The letter went on to raise for the first time a prematurity objection. It argued that the proposed development would be of such a scale that the soundness of the proposed allocation in CBC's draft DS should be determined through the examination in public of that plan so as to avoid prejudicing scrutiny of HRN1 as part of CBC's wider strategy and the outcome of that process. Not surprisingly, when the committee met on the 28 August they resolved to defer consideration of the application so that they could be advised in more detail about the merits of the objections recently made by LBC. That resulted in the production of September 2013 OR which was considered by the Committee when they reconvened on 4 September 2013.

The Officers' Reports to Committee

65. It is of course axiomatic that a report of this kind should be read as a whole. The main report was a carefully structured analysis of the issues relevant to the planning application as the officers saw them. It is important to bear in mind when looking at any particular paragraph challenged that it is frequently interrelated with material which either precedes or follows it.

66. In this part of the judgment I will set out some of the key paragraphs in the August 2013 OR. In the General Introduction (page 7) it was stated that:-

> "The proposal, and those that will inevitably follow it, will change the physical, social and economic environment for the residents of the conurbation and beyond by providing or being associated with major new road infrastructure, significant amounts of new housing, new employment floorspace, open spaces, community facilities, shopping floorspace and public transportation.
>
> For that reason, it is important that Members consider carefully the process by which it reaches a decision. This report is structured to assist the Committee in reaching a clear and lawful decision, taking into account all of the matters that it must."

67. There then followed an Executive Summary.

> "(ii) There has been a long history of promoting growth of the conurbation at Houghton Regis which originates with the principle of seeking growth points as sought by Government's Sustainable Communities Plan in 2003, then specifically through the old Regional Spatial Strategy for the east of England, and the Milton Keynes South Midlands Sub Regional Strategy. This latter document of 2005 included the early

> recognition that there would be a need to consider the removal of the Green Belt to the north of Houghton Regis and Dunstable for this purpose. This included also the need for a strategic road to link the A5 to the M1 via a new Junction 11a. All subsequent local actions for delivering a local plan, including the publication of local planning documents and associated public consultation have been predicated on this history and has occurred after the publication of the current Development Plan for the area.
>
> …
>
> (iv) …It is worthy of notice that there have been very few objections to the principle of development.
>
> …
>
> (viii) There are a number of issues arising from the proposals that are key to a commercially viable development as proposed but are also of significant concern to the statutory consultees, Luton Borough Council or Council advisors. These issues are:
>
> - The amount of affordable housing that can be afforded by the development.
>
> …
>
> - The relationship between the development, the A5 – M1 link road and the Woodside link."

68. There then followed a section entitled "planning context and history" which included the following extracts.

> "The application site has been identified as a site with the potential to accommodate sustainable mixed use development for a number of years. Regional Planning Guidance note 9 (2001) identified an area north of Luton/Dunstable/Houghton Regis, including the application site, as an area in which a mixed use urban extension should be brought forward as the most sustainable way of accommodating the bulk of housing development required in this area."

69. Similarly the officer's report referred to the sub regional strategy of 2005 "which proposed the *area* as a location for growth …" (emphasis added).

> "The effect of the new RSS and the Milton South Midlands Sub Regional Strategy was to allocate the Houghton Regis Strategic Urban Extension (within which the application is located) for residential, employment and supporting community uses, in an area where the Green Belt was to be rolled back, albeit with the

Local Development Strategy being asked to set the exact boundaries.

Towards that end, a Joint Planning Committee from Luton Borough Council, the former South Bedfordshire District Council and the former Bedfordshire County Council was formally created to deliver 'The Luton and South Bedfordshire Joint Core Strategy'. This document reached Examination Stage in 2011 and included land to the north of Houghton Regis as an urban extension. Following the withdrawal of that document and the dissolving of the Joint Committee for unrelated reasons, the proposal is now included within the Development Strategy for Central Bedfordshire which will be submitted to the Secretary of State in the near future. That Development Strategy includes a specific policy for the allocation of the Houghton Regis SUE and for the removal of Green Belt to accommodate it."

70. The next section of the report summarised in considerable detail representations made by consultees and others on the planning application. CBC's Strategic Planning and Housing Team Leader made a number of pertinent points, including the following:

"The Joint Core Strategy for Luton and Southern Central Bedfordshire was endorsed for development management purposes by Central Bedfordshire Council's Executive in August 2011 and still remains a material consideration. However, given the time that has elapsed since the endorsement and the progress now made on the Development Strategy, more weight should be given to the Development Strategy."

"The circumstances that have led to this planning application being drawn up in advance of the plan-making process are understood. *However, determining a planning application of this scale in advance of the plan-making process being completed should not be done lightly, if the integrity of the plan-led system is to remain. There would need to be significant benefits to the public interest to justify such a decision.*

It is noticeable that there is no groundswell of public opinion against the proposal evident through the consultations on the Development Strategy and, indeed, this has been the case going back 7 or 8 years to previous Joint Committee consultations. *Even objections to this proposal from the development industry have been relatively limited, with new sites being proposed in addition to, rather than instead of, Houghton Regis North.*

The particular circumstances of this site mean it appears highly suitable for development, as set out in the Sustainability Appraisal report for the Development Strategy. Of particular note are the size of the site, its location adjacent to an area of

high housing demand, its ability to deliver key road infrastructure to the benefits of the wider area and the relative lack of constraints. *In my view, it is difficult to envisage a strategy to meet housing needs that does not include, in some form, development of this site. This should be considered in relation to the question of prematurity*" (emphasis added).

71. The report then set out a list of "determining issues", each of which was treated as a heading under which more detailed advice was given by officers to the Committee. The first subject was "compliance with the adopted development plan for the area". Paragraph 1.3 set out gave advice which went to the very heart of the issues which the members had to determine:

> "1.3 In respect of the Green Belt, policy GB2 confirms that the site lies within the Green Belt where no exception for major development is made. Significant weight should be given to this policy. Therefore the Committee will need to consider whether there are any very special circumstances for development of the site.
>
> [The key issue of principle when considering the planning application is that as the proposed Houghton Regis North SUE allocation has not yet been formally confirmed in an adopted Development Plan, the application site has not yet been removed from the Green Belt. Therefore a key consideration in determining this application is whether the application is premature when read against policy GB2 in advance of the formal adoption of the replacement Development Plan. Then having considered that, whether there are very special circumstances that would support planning permission in advance of the adoption of the Development Strategy. It is a fact that the site lies in the Green Belt and so the planning application represents inappropriate development in the Green Belt. Therefore it should only be permitted if very special circumstances (VSCs) apply. This argument is presented in detail within Section 3 below.]"

72. The second subject was "Compliance with the National Planning Policy Framework". After referring to the research carried out in the past in order to plan for the economic growth of the area (para.2.3), the report continued:

> "2.4 The applicant has highlighted the economic advantages of the proposal within their Planning Statement submitted with the application. They point to the proposal providing 32 hectares of employment land, up to 130,500 sq m of commercial floorspace and additional jobs from retail, schools, leisure and recreation facilities and services. They expect in the region of 2,500 permanent jobs and a further 2,500 temporary construction jobs over the lifetime of the development.

> 2.5 Central Bedfordshire Council is proactively planning for the development needs for business by ensuring that sufficient land is allocated in the forthcoming Development Strategy for new employment use. This is being allocated on several new employment sites, but includes the express requirement that significant new employment provision is included within the Houghton Regis North proposed Urban Extension. This is balanced by the allocation of sufficient housing to not only reflect the anticipated growth in the area but also to offer new business and employment opportunities. The planning application provides for 32ha of new employment land as part of its proposals and therefore can be considered to comply with emerging Development Plan policy and the NPPF in this respect.
>
> 2.6 The significance of the investment that both local government, national government and from the applicants for this planning application are making to the delivery of the A5 to M1 Link Road and Junction 11a is substantial. This infrastructure is crucial to open up opportunities for business investment; not least within Dunstable where it will help to ameliorate the congestion in the town centre. The Woodside Link Road in turn will offer an alternative route for business traffic that is currently hampered by poor connections to the motorway network. Together, the A5-M1 Link Road and the Woodside Link Road, present the opportunity to encourage significant new business investment in the area."

73. Paragraph 2.9 referred expressly to the advice which CBC had received from the independent retail consultant, Turleys, on the application of retail policy in NPPF. The attention of the members was specifically drawn to the following:

> "3. There is concern about the robustness of the applicant's sequential approach where the applicant has not justified why there is no assessment of the ability of alternative sites to cater for retail provision."
>
> "4. The council should balance the negative impacts of a retail development that diverts investment against the beneficial impacts of the overall development. Such benefits are a material consideration."

74. Pages 59-61 of the officer's report contained a careful assessment of the potential economic impact of the proposed retail floor space within the development. I record that no legal challenge is made to that part of the report.

75. Paragraph 2.18 of the report gave important advice to members. It reminded them that Green Belt policy is a fundamental policy within the NPPF. It pointed out that the proposal was for "inappropriate development" which is by definition harmful to

the Green Belt and should not be approved except in very special circumstances. The policy from the NPPF was quoted:-

> "When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. "Very special circumstances" will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations."

76. The report then directed members that this was the "primary decision" that the Council would need to reach before considering other material considerations and for that reason the issue was dealt with separately in the following section 3 of the report. Paragraph 3.1 of the report stated:

> "3.1 The site subject of this planning application lies wholly within the approved Green Belt for the area. The proposed policy of the emerging Development Strategy suggests that the Green Belt in the area to the north of Houghton Regis and south of the proposed new A5-M1 link road is removed to make way for the proposed urban expansion. There is a substantial body of evidence developed through that process which has concluded that it is appropriate to remove the Green Belt designation to allow for the urban expansion within which the application is set. However, this policy is not yet in place. Therefore it falls to the Council to determine whether "very special circumstances" exist for this development to proceed."

77. Paragraphs 3.2 – 3.7 then analysed the extent to which the proposals would cause specific harm to any of the five purposes of Green Belt designation. In summary, it was concluded that the proposal would not cause harm as regards prevention of coalescence, preservation of special character or the regeneration of urban land. As to checking the unrestricted sprawl of large built up areas, the members were advised that plainly the proposal was of a substantial size, involving the development of 262 hectares. On the other hand "it is not unrestricted in the sense that there is a substantial physical boundary within which it will be clearly contained: i.e. the approved line of the A5-M1 strategic link road. Whilst the Green Belt is harmed by the proposal in this sense, it is recognised that this new road will form a strong physical boundary against further sprawl to the north of Houghton Regis by its nature." The key element of harm to Green Belt purpose was identified in paragraph 3.5 of the report in the following terms, "the area affected is of a pleasant open rural and rural fringe character though the landscape analysis of the site concludes that the area does differ in quality across the site. However, the proposal by reason of its scale will encroach upon the countryside and will be harmful as a result." Paragraph 3.8 then stated:

> "3.8 On the basis that there will be harm to the Green Belt by reason of the proposal's impact through extending an urban area into the countryside, then it is necessary to determine what "very special circumstances" may exist that clearly outweighs that harm."

78. Paragraph 3.9 advised the members on the sort of factors which could be considered to amount to very special circumstances. No criticism is directed to that paragraph. It is relevant to note the following advice which it contained, "the important point to bear in mind is that the substantial benefits must arise from the unique circumstances of the proposal or otherwise it could be repeated too often, to the long term, cumulative harm of the Green Belt." Paragraph 3.10-3.20 set out in detail the officer's analysis to whether very special circumstances existed in this case. In particular, paragraph 3.10 stated:

> "3.10 The following are considered very special circumstances in favour of the application proposal:
>
> (1) *There is a clear urgent need for development of land in the Green Belt in order to meet immediate housing and economic need for the area identified now and over the next 20 years*;
>
> (2) Successive emerging Development Plans since 2001 have identified the application site as being suitable for removal from the Green Belt and allocation as a residential-led mixed use development. *The abandoned Joint Core Strategy was not abandoned due to any disagreement between the joint Councils regarding this site. Its intended removal from the Green Belt and its allocation for residential and commercial development was supported by both councils at the Joint Planning Committee.*
>
> (3) The emerging Central Bedfordshire Development Strategy re-affirms the Houghton Regis North allocation for removal from the Green Belt and development for an urban extension of Houghton Regis to meet urgent need.
>
> (4) CBC has shown its continued commitment to the development of Houghton Regis through the production of the Houghton Regis North Framework Plan 2012, adopted for Development Control purposes in advance of the adoption of the emerging Development Strategy.
>
> (5) *The planning application will directly fund a £45m contribution towards the costs of the M1-A5 link road, which is identified in the Chancellor's Autumn Statement 2012 as a key infrastructure project for the nation. The funding contribution enabled by this development and delivery of the A5-M1 Link*

will generate a substantial amount of economic benefit to the wider area.

(6) No formal Local Plan has been adopted since 2004, despite the clear continuing identification of the site in replacement planning policy documents. If subsequent Development Plan documents had reached adoption stage, then the application site would have been allocated for residential development and removed formally from the Green Belt. *Delaying a decision or refusing the planning application on Green Belt grounds until the adoption of the Development Strategy and the formal confirmation of the planning allocation in the Development Plan will serve no good purpose, other than to delay much needed housing and employment opportunities for the area, and set back the delivery of the M1-A5 link Road and Junction 11a works to the M1 that is concerned a nationally important infrastructure project*" (emphasis added).

79. In paragraph 3.11 members were reminded that in October 2012 the Secretary of State for Transport had published an interim decision letter confirming that he was minded to approve proposed A5-M1 link road. The Secretary of State had made it clear, however, that the final decision would be issued as and when a planning permission for the proposed development at HRN1 was issued so as to secure the remainder of the funding required to deliver the link road. Paragraph 3.12 adopted the reasoning of the Inspector at the link road inquiry as to why there were very special circumstances to justify that scheme. The officer then advised on the implications of the link road for the merits of the HRN1 application:

> "3.13 This strategic link road adjoining the development is a unique feature. The benefits of the new strategic road have been recognised through a separate process of formal application, Public Inquiry and decision making at a national level. The achievement of those benefits is directly linked to the delivery of this application. It is considered that this is a very special circumstance which outweighs the identified harm to the Green Belt."

80. Paragraphs 3.14 - 3.16 explained why the scheme's promotion of economic growth should also be treated as forming part of very special circumstances:

> "3.14 The scale of the development proposal offers an opportunity for economic growth on a variety of fronts. Economic growth is a national objective, a priority of the Government and is an important material consideration set out in the National Planning Policy Framework. The proposal includes the provision of a substantial amount of new employment land and in particular the opportunity for firms to take advantage of the infrastructure assets unique to its location: new and fast access to the motorway network, new

bus links via the Guided Busway project which is to be completed in September 2013, fast links to an international airport and on a scale that offers new opportunities to boost the local economy through the substantial new growth in spending as new families and businesses locate in the area.

3.15 This anticipated economic growth on this scale of development proposed is not unique in a national context, but neither are such large scale development proposals common. The proposal will certainly have a regional significance boosting construction, new opportunities for business expansion and creation, new national distribution opportunities and creating new consumer demand. In respect of the local economy, there will be more opportunities for employment in an area in which there is a particular need.

3.16 It is considered that the potential for this development to assist in providing economic growth opportunities on a large scale is itself a very special circumstance. It is further considered that the scale of the proposal offers sufficient benefits to substantially outweigh the harm caused to the Green Belt in this location."

81. Paragraphs 3.17-3.18 of the report explained why the proposal's contribution to meeting housing needs in the area, including needs arising within Luton Borough, also contributed to very special circumstances:

"3.17 The evidence underlying the proposed Central Bedfordshire Development Strategy (and the planning history beforehand) underlines the clear need for a substantial growth in housing in this area and is referred to elsewhere in this report. That need is identified as 28,700 homes over a plan period up to 2031. It is a need of a scale that has resulted in proposals for three major urban extensions totalling some 13,500 dwellings in addition to that sought from other sources. This development proposal forms a significant part (5150 dwellings) of that proposed provision.

3.18 In the face of this substantial need, which arises not only from within the Central Bedfordshire area but also from its neighbour, Luton Borough, it is appropriate for the Committee to decide that the ability of the application to deliver a substantial portion of the required housing and its accompanying requirement for infrastructure is a very special circumstance. Bearing in mind that the evidence underlying the Council's proposed Development Strategy concludes that a release of Green Belt land is appropriate then it is also appropriate to take the view that the ability to address an identified need by means of the application proposals substantially outweighs the harm caused to the Green Belt."

82. Paragraph 3.19 then dealt with other proposed uses within the development including community buildings, public open space, and leisure facilities. It was clearly stated that those elements should not be considered as providing benefits sufficiently substantial as to amount to a very special circumstance.

83. The overall conclusion to section 3 of the report read:

> "3.20 In conclusion, whilst it is acknowledged that the proposals could be considered to be harmful to the Green Belt by encroaching upon the countryside, it is also considered that the historic strategic planning policy context, the delivery of the A5-M1 strategic road, the significant economic growth potential for the area and the well evidenced and substantial housing need are all sufficient, "very special circumstances" to outweigh any harm caused."

84. Section 4 of the officer's report dealt with the Luton and South-Central Bedfordshire Joint Core Strategy. The report recognised the circumstances in which this plan had been withdrawn in 2011 and advised that although that strategy together with the regional planning policies had fallen by the wayside, the underlying evidence base continued to support a growth agenda for Luton, Dunstable and the Houghton Regis area. Thus, on 23 August 2011 CBC endorsed the former Joint Core Strategy for development/management purposes and had incorporated the majority of the work already undertaken on within the emerging Central Bedfordshire DS. Paragraph 4.4 of the report is of some importance when considering criticisms made by the Claimant:

> "4.4 The Committee could reasonably give some weight to the fact that the current proposal complies with the policies contained in the L&SCB JCS document in that it proposed the allocation of land at Houghton Regis North for Urban Extension and is based upon a history of policy development to that end. It is within *that area* that this planning application lies" (emphasis added).

85. Section 5 of the officer's report advised members on how they should approach the pre-submission version of CBC's DS. Paragraph 5.1 reads:

> "5.1 The Central Bedfordshire Development Strategy document is at a stage of production where it is ready to be submitted for Examination. At this stage, the weight given to the document is significant and greater than the L&SCB Joint Core Strategy. Once submitted, it would supersede that document. However, until it is formally adopted, the National Planning Policy Framework should carry greater weight."

86. Paragraph 5.32 summarised the application of policy 60 of the DS to the planning application. It stated that the application had been designed to align closely to the details of the policy so that it was "broadly compliant with it". Paragraph 5.33 then advised that greater weight should be given to the policies of the draft DS than the adopted South Bedfordshire Local Plan Review 2004. A major reason for that conclusion was that, self-evidently, the 2004 plan substantially pre-dated the NPPF, whereas the DS had been prepared so as to accord with the NPPF.

> "5.34 The planning application conforms closely to the policy direction that the Council wishes to go and explicitly delivers a major part of the urban extensions at Houghton Regis that the Council considers to be a key part of its Development Strategy.
>
> 5.35 Taking all of the above policy analysis in previous sections into account, the Committee is advised to give substantial weight to the pre-Submission Development Strategy for Central Bedfordshire with the exception of retail policy 12 and parking policy 27 (which will need correcting). The reason is that the Development Strategy has been written to be in accordance with national planning policy set out in the National Planning Policy Framework 2012.
>
> 5.36 The Committee will recognise that this "weighting" appears not to give the Development Plan primacy when making a decision on a planning application. However, this is because in the Case Officer's opinion, the current adopted Development Plan is not up-to-date sufficiently to deal with the planning application as submitted or to comply with the NPPF."

87. Section 8 of the officer's report addressed issues arising from the Environmental Impact Assessment. Paragraphs 8.14-8.23 dealt with the subject of Affordable Housing. Paragraph 8.17 of the report stated that from the outset that the developer had been clear that because of challenging economic conditions and exceptional costs applicable to the development, its viability had been affected "to the extent that the full expectations for affordable housing cannot be delivered." The accuracy of paragraphs 8.19 and 8.20 has not been challenged in these proceedings:

> "8.19 However, as part of the original Luton and South Bedfordshire Joint Committee, both LBC and CBC will have been aware that the delivery of the substantial growth sought by both Councils was dependent on the delivery of a substantial amount of costly infrastructure. Both will also have been aware of the "Infrastructure Delivery Plan and Funding Study commissioned by both Councils and undertaken by AECOM which was completed on October 2010. The study determined that given the overall scale and spatial allocation of infrastructure required across Luton and southern Central Bedfordshire that there was going to be a significant

> infrastructure deficit and an understanding that his was likely to cause viability issues for whichever large scale urban extension was being considered around the Luton/Dunstable/Houghton Regis conurbation.
>
> 8.20 CBC, through its individual efforts and with the co-operation of the developer and the Department of Transport, has sought to secure one of the most significant and necessarily expensive infrastructure projects, the A5-M1 link. This adds to the understanding that there will be an impact on the likely amount of affordable housing that can be obtained from this particular development."

88. The assessment of the amount of affordable housing that could be provided both as a minimum and as part of the uplift mechanism was dependent upon the viability appraisal work undertaken by the developer and reviewed by the CBC's independent consultants, E C Harris. The planning application submitted on the 24 December 2012 had been accompanied by a Viability Statement (para. 9.9). The financial information underpinning the conclusions of the viability appraisal work was commercially confidential, for the reasons explained in a letter dated 5 March 2013 sent to CBC by the Applicant's legal advisor. The officer's report made it plain that that letter had been publically available on the Defendant's planning application file (para. 9.8). I return to this part of the report when considering Ground 7 of the challenge.

89. The conclusions of the report were set out in section 11:

> "11.1 The application proposal is for the larger part of the Houghton Regis Urban Extension which is in turn part of the larger strategy for providing significant urban extensions to accommodate much needed additional housing and employment growth in the area. Much of that growth is being planned for in urban extensions not just here, but also at Leighton – Linslade and to the North of Luton. The application proposal is therefore a critical part of a larger strategy to provide not only significant growth within Central Bedfordshire but to accommodate the needs of a growing conurbation including Luton, Dunstable and Houghton Regis.
>
> 11.2 The balance to be struck in considering this application, involves the competing demands of commercial viability, loss of Green Belt, need for housing, the clear national priority for economic growth, landscape and ecological protection, urban regeneration, providing community facilities for a healthy population and meeting the Council's stated priority of delivering a major new strategic road of national significance. All in a context of reducing public services and public financial support.

> 11.3 It is considered that the scheme is insufficiently financially viable at present to afford the full requirements for affordable housing and the full package of mitigation. However, the mitigation package suggested above is still extremely significant and has been shaped by reference to identified local priorities. The work undertaken with the applicant's representatives has been conducted in an informed and conscious way to achieve the mitigation package and review/uplift mechanism which both parties believe best reflects local priorities. For example, the approach to the provision of green infrastructure, the forward funding (£45m) of the A5-M1 link road and new M1 junction before significant development is achieved all reflects local priorities. The application has been the subject of extensive consultation with a significant majority or responses not objecting in principle or positively supporting the proposals.
>
> 11.4 The Committee will wish to take into account that the planning application has been submitted in advance of the adoption of the Development Plan, in which the site is an allocated strategic development site proposed for removal from the Green Belt. However, it should also be recognised that the now revoked Regional Spatial Strategy for the East of England and the withdrawn Joint Core Strategy both identified the site as being suitable for removal from the Green Belt in order to help meet housing and employment need. The evidence base shows there is nowhere else more suitable for the growth to go. In considering the very special circumstances in relation to development in the Green Belt, it is concluded that the tests have been met. It assists in delivering the A5-M1 link road. It is recognised that the planning application is critical locally, regionally and nationally in helping to boost much needed housing, infrastructure provision and economic investment."

Legal Principles for reviewing decisions taken by a local planning authority

90. A great many of LBC's grounds involve criticisms of the officers' reports to CBC's committee. Accordingly, it is necessary to refer to the legal principles which govern challenges of this kind. I gratefully adopt the summary given by Mr Justice Hickinbottom in the case of The Queen (Zurich Assurance Ltd trading as Threadneedle Property Investments) -v- North Lincolnshire Council [2012] EWHC 3708 (Admin) at paragraphs 15-16.

> "15. Each local planning authority delegates its planning functions to a planning committee, which acts on the basis of information provided by case officers in the form of a report. Such a report usually also includes a recommendation as to how the application should be dealt with. With regard to such reports:

(i) In the absence of contrary evidence, it is a reasonable inference that members of the planning committee follow the reasoning of the report, particularly where a recommendation is adopted.

(ii) When challenged, such reports are not to be subjected to the same exegesis that might be appropriate for the interpretation of a statute: what is required is a fair reading of the report as a whole. Consequently:

"[A]n application for judicial review based on criticisms of the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken" (Oxton Farms, Samuel Smiths Old Brewery (Tadcaster) v Selby District Council (18 April 1997) 1997 WL 1106106, per Judge LJ as he then was).

(iii) In construing reports, it has to be borne in mind that they are addressed to a "knowledgeable readership", including council members "who, by virtue of that membership, may be expected to have a substantial local and background knowledge" (R v Mendip District Council ex parte Fabre (2000) 80 P & CR 500, per Sullivan J as he then was). That background knowledge includes "a working knowledge of the statutory test" for determination of a planning application (Oxton Farms, per Pill LJ).

16. The principles relevant to the proper approach to national and local planning policy are equally uncontroversial:

(i) The interpretation of policy is a matter of law, not of planning judgment (Tesco Stores Ltd v Dundee City Council [2012] UKSC 13).

(ii) National planning policy, and any relevant local plan or strategy, are material considerations; but local authorities need not follow such guidance or plan, if other material considerations outweigh them.

(iii) Whereas what amounts to a material consideration is a matter of law, the weight to be given to such considerations is a question of planning judgment: the part any particular material consideration should play in the decision-making process, if any, is a matter entirely for the planning committee (Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759 at page 780 per Lord Hoffman)."

91. I would also draw together some further citations:

> "[The purpose of an officer's report] is not to decide the issue, but to inform the members of the relevant considerations relating to the application. It is not addressed to the world at large but to council members, who, by virtue of that membership, may be expected to have substantial local and background knowledge. There would be no point in a planning officer's report setting out in great detail background material, for example in respect of local topography, development plan policies or matters of planning history if the members were only too familiar with that material. Part of a planning officer's expert function in reporting to the committee must be to make an assessment of how much information needs to be included in his or her report in order to avoid burdening a busy committee with excessive and unnecessary detail." (per Sullivan J in *R v Mendip DC ex p Fabre* (2000) 80 P&CR 500 at 509).

92. In *R (Siraj) v Kirkless MBC* [2010] EWCA Civ 1286 Sullivan LJ stated at para. 19:

> "It has been repeatedly emphasised that officers' reports such as this should not be construed as though they were enactments. They should be read as a whole and in a common sense manner, bearing in mind the fact that they are addressed to an informed readership, in this case the respondent's planning subcommittee"

93. In *R (Maxwell) -v- Wiltshire Council* [2011] EWHC 1840 (Admin) at paragraph 43 Sales J (as he then was) stated:

> "The Court should focus on the substance of a report of officers given in the present sort of context, to see whether it has sufficiently drawn councillors' attention to the proper approach required by the law and material considerations, rather than to insist upon an elaborate citation of underlying background materials. Otherwise, there will be a danger that officers will draft reports with excessive defensiveness, lengthening them and over-burdening them with quotations of material, which may have a tendency to undermine the willingness and ability of busy council members to read and digest them effectively."

94. In *Morge v Hants CC* [2011] UKSC 2; [2011] PTSR 337 at [36] Baroness Hale of Richmond said:

> " … in this country planning decisions are taken by democratically elected councillors, responsible to, and sensitive to the concerns of, their local communities. As Lord Hoffmann put it in *R (Alconbury Developments Ltd) v Secretary of State*

> *for the Environment, Transport and the Regions [2003] 2 AC 295* , para 69: "In a democratic country, decisions about what the general interest requires are made by democratically elected bodies or persons accountable to them." Democratically elected bodies go about their decision-making in a different way from courts. They have professional advisers who investigate and report to them. Those reports obviously have to be clear and full enough to enable them to understand the issues and make up their minds within the limits that the law allows them. But the courts should not impose too demanding a standard upon such reports, for otherwise their whole purpose will be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves. It is their job, and not the court's, to weigh the competing public and private interests involved."

95. In *R (Bishops Stortford Federation) v East Herts DC* [2014] PTSR 1035 Cranston J held at paragraph 40:

> "The courts have cautioned against undue judicial intervention in policy judgments by expert tribunals within their areas of special competence (see AH (Sudan) v Secretary of State for the Home Department (United Nations High Comr for Refugees intervening) [2008] AC 678 , para 30, per Baroness Hale of Richmond), and this reticence has been applied to considering the decisions of planning inspectors on issues of planning judgment: see *Wychavon District Council v Secretary of State for Committees and Local Government [2009] PTSR 19* , para 43, per Carnwath LJ. Arguably, the same applies to experienced planning committees with their training and codes of conduct."

96. A number of the issues raised by LBC in these proceedings were not mentioned in its representations to CBC (e.g. the application of the sequential test). However, LBC correctly makes the point that that does not alter LBC's standing or entitlement to bring a claim for judicial review to quash the planning permission relying on such matters (see Kides v South Cambridgeshire D.C. [2003] 1 P & CR 19 at para 132-134). LBC has a genuine interest in obtaining the relief sought.

97. However, the principle in Kides does not detract from the principle laid down in Fabre, Oxton and related authorities as to the approach to be taken to a judicial review of a local authority's decision to grant planning permission on the basis of an officer's report to committee. It is primarily the function of the officers to judge which issues to address in the report and which to omit, as well as the depth to which any issue included in the report is explored and the amount of information supplied. Quite apart from the Kides issue of standing, there is a separate and crucial question for the Court to determine, namely whether the officer's report can be said to have been defective because it was significantly misleading, applying the tests in Oxton and Fabre. On that aspect a failure by parties to raise an issue in their representations to the local planning authority may be highly material, if not determinative, unless that issue was one which the legislation required the authority to take into account in any event (e.g.

the statutory development plan - see section 70(2) of the Town and County Planning Act 1990 and R (St James's Homes Ltd) v Secretary of State [2001] EWHC Admin 30; [2001] PLCR 27)).

98. I should also refer to the decision of the Court of Appeal in R v Secretary of State for the Environment ex parte Powis [1989] IWLR 584 in which the Court of Appeal held that in general judicial review is to be conducted by reference to the material which was before the decision-maker at the time of his or her decision and without regard to fresh evidence. That principle is subject to exceptions, including evidence on whether or not a procedural error has been committed, such as a breach of a legitimate expectation.

Grounds 1, 3, 4 and 5

99. Mr Village QC grouped these four grounds under one heading as misdirections by CBC.

Ground 1

100. In summary, LBC submits that CBC failed to take into account paragraph 83 of the NPPF, or to apply that paragraph when dealing with the issue of whether the grant of planning permission would be premature prior to the completion of the examination of the draft DS (the "prematurity" issue). In effect the officers' report acknowledged that a permission for HRN1 would result in the site being removed from the Green Belt in any future review of Green Belt boundaries (paras 3.1 and 11.4) LBC also relies upon paragraph 12 of the Secretary of State's decision letter dated 30 September 2014, adopting paragraph 4.111 of the Examining Authority's report.

101. In so far as is material paragraph 83 of the NPPF provides:-

> "…Once established Green Belt boundaries should only be altered in exceptional circumstances through the preparation or review of a local plan."

102. LBC submits that paragraph 83 requires the removal of a site from the Green Belt to be dealt with solely through the local plan process so that the relevant issues can be examined by an independent Inspector. It is however important to note that Mr Village very fairly accepted that he was relying upon a policy principle, rather than a legal rule. He nevertheless submitted that paragraph 83 contains an "injunction" to local planning authorities to deal with the matter through the preparation and adoption of a local plan and criticised the officer's report, in particular paragraph 3.10(6), for failing to draw the attention of members to that "injunction" (or more accurately policy requirement). He added that the effect of CBC's decision had been improperly to circumvent its duty to co-operate with LBC under section 33A of the 2004 Act in relation to strategic development proposals. He said that the report had therefore "significantly misled" the Committee, applying the Oxton test.

103. CBC and the IP submit that there was before the local planning authority a planning application which it was statutorily obliged to determine. Paragraph 83 of the NPPF could not override that duty. It relates to the authority's plan-making function, rather than to its development management role. In the latter situation, paragraphs 87 and

88 of the NPPF are apposite: "inappropriate development" should not be permitted in the Green Belt unless "very special circumstances" are demonstrated which clearly outweigh any harm. The IP submits that those paragraphs are not disapplied simply because a proposal involves large scale development. The duty to co-operate applied to CBC's plan-making function and does not require development management decisions to be put on hold whilst the plan-making process is completed.

Discussion

104. In my judgment there can be no doubt that CBC was under a duty to determine the HRN1 application according to paragraphs 87 to 88 of the NPPF. Paragraph 83 is directed to the review of Green Belt boundaries through the local plan process and therefore was not directly in play.

105. However, it does not follow that paragraph 83 is incapable of being relevant in the determination of a planning application. It may be material where the decision-maker is considering whether the proposal should be refused on the grounds of prematurity. All parties agreed that at the time of the decision the relevant material policy on prematurity was contained in the Planning Practice Guidance ("PPG") (which is broadly to the same effect as earlier guidance). The PPG suggests that prematurity is unlikely to constitute a reason for refusal of planning permission unless (inter alia):-

> "the development proposed is so substantial, or its cumulative effect would be so significant, that to grant permission would undermine the plan-making process by predetermining decisions about the scale, location or planning of new development that are central to an emerging Local Plan."

106. In applying that guidance, paragraph 83 of the NPPF may be a material consideration. In the circumstances of a particular case, a planning authority *might* judge that the release of a site from the Green Belt by the grant of planning permission would be premature because it would pre-empt decisions which ought to be taken through a review of Green Belt boundaries, in order to prevent the plan-making process from being undermined.

107. In the present case the real issue is, applying Oxton and Fabre, to what extent was it necessary as a matter of law for the officers' reports to refer to the policy principle in paragraph 83 of the NPPF. For that purpose it is very relevant to consider the way in which the issues were presented to CBC by LBC and others. Even in its last minute representations of 27 August 2013, LBC made no reference to the principle in paragraph 83, even though at that stage it raised a prematurity objection for the first time (and the letter was "endorsed" by Counsel). The "paragraph 83" point was not raised by LBC until after LBC had decided to grant planning permission, namely in its letter dated 7 October 2013 requesting the Secretary of State to call in the application for his own determination. Even then, prematurity was only raised in a generalised manner, without any real attempt to explain specifically why a release of the site should only be dealt with through the plan-making process (see also the Secretary of State's reply dated 30 January 2014 refusing to call in the decision). The suggestion in the Claimant's Skeleton that the application of paragraph 83 of the NPPF was linked to compliance with CBC's duty to co-operate under section 33A was not raised at that stage.

108. LBC has not suggested that "paragraph 83" arguments were raised by other parties to any substantial extent, or even at all.

109. When seen in this context, I am satisfied that the officer's report (and consequently CBC's decision) cannot be faulted as a matter of law under ground 1. First, the reports did address the prematurity issue in sufficient depth. The importance of the issue was explained in the comments of the Strategic Planning and Housing Team Leader at page 49 and in para. 1.3 of the August 2013 OR. The September 2013 OR for the adjourned Committee meeting on 4 September 2013 specifically addressed the prematurity points raised in LBC's letter of 27 August 2013. The contrary is not suggested. The officer referred to the "pressing need" for the proposed housing and infrastructure and the previous support of LBC for development in this location. The members were advised on the policy guidance relied upon by LBC and they concluded that the grant of permission would not unacceptably prejudice the emerging development plan and that it would be inappropriate to delay approval to the scheme. Those were properly matters of judgment for CBC.

110. Second, paragraphs 3.1, 3.10(6), and 11.4 show that, in any event, CBC had well in mind the policy principle that ordinarily a Green Belt boundary is only reviewed through the local plan process. Given the context I have already summarised, as well as the principles laid down in Oxton and Fabre, there was no requirement for CBC to go further into the application of paragraph 83 of the NPPF. There was nothing misleading about the reports to Committee in this respect. Accordingly, I reject ground 1.

111. I think it would be helpful to consider ground 4 next.

Ground 4

Submissions

112. LBC complains that paragraphs 3.10(2) and 11.4 "materially over-stated HRN1's planning pedigree" by stating that:-

> "… successive emerging development plans since 2001 have indentified the application site as being suitable for removal from the Green Belt and suitable for allocation as a residential-led mixed use development,
>
> - the revoked regional strategy identified the site as being suitable for removal from the Green Belt in order to help meet housing and employment need."

LBC says that this was "significantly misleading" applying the Oxton test, because although the withdrawn Joint Core Strategy and CBC's draft DS do identify the HRN1 *site* as being suitable for release from the Green Belt as an expansion of the urban area, the earlier policy documents did not do so, given that they were strategic plans and therefore not site-specific. However, Mr Village QC accepted that Policy 2(iii) of the Sub-Regional Strategy (2005) and the draft East of England Plan (2008) (which incorporated the former), identified an "area of search" for a sustainable urban extension, and that HRN1 fell within that area of search.

113. Secondly, LBC, relying upon Hunston Properties Ltd v Secretary of State [2013] EWHC 2678 (Admin), criticises paragraph 4.4 of the August 2013 OR for giving "some weight" to the Joint Core Strategy. It is said that in view of the fact that that plan had been withdrawn, the Committee could only have been advised to give "no weight" to the plan.

114. I note, however, that neither of these points was mentioned in LBC's letter to CBC of 27 August 2013.

Discussion

115. As regards the first contention, the paragraphs criticised by LBC need to be read in the context of the officers' report as a whole. Pages 10 and 11 made it clear that the earlier strategic plans had merely identified an *area* to the north of Luton/Dunstable/Houghton Regis within which a mixed use urban extension should be brought forward. Read in context, the summarising sentences in paragraphs 3.10(2) and 11.4 cannot be treated as "significantly misleading". Moreover, the policy background would have been well-known to members of the Committee.

116. There is no merit either in the second contention which would have the absolute effect of preventing any weight being given to any policy or plan which had been withdrawn simply because of the bare fact of withdrawal. I reject that argument. First, paragraph 13 of the first instance judgment in Hunston only recorded a matter of common ground between the parties in that case (and no doubt in the context of the circumstances of that case). The point was neither argued nor decided and so Hunston could not be an authority for this purpose.

117. Second, in my judgment a plan which has been withdrawn *may* form part of the relevant planning history for the determination of a planning application, depending upon the circumstances in which that plan was drawn up and, more particularly, withdrawn. The present case illustrates the point. LBC has overlooked paragraphs 3.10(2), and 4.1 to 4.5 of the August 2013 OR.

118. Paragraph 3.10(2) (the accuracy of which is not challenged by LBC) records that the Joint Core Strategy was not abandoned because of any disagreement by LBC regarding the HRN1 site; its intended removal from the Green Belt and allocation for residential and commercial development was promoted by both councils (i.e. LBC and CBC). In section 4 of the report officers made the following points:-

> "(i) In August 2011 CBC had endorsed the evidence base underlying the East of England Regional Plan and the Joint Core Strategy and had incorporated the majority of that work in its own draft Development Strategy;
>
> (ii) It was a matter for the Committee to decide how much weight to be given to the Joint Core Strategy;
>
> (iii) The Committee could give "some weight" to the Joint Core Strategy in that its allocation of land at Houghton Regis North for an urban extension was based upon a history of policy development to that end."

119. Accordingly, I reject ground 4 of the challenge.

Ground 3

Submissions

120. LBC challenges the conclusion in paragraph 5.35 of the August 2013 OR that "substantial weight" be given to CBC's pre-submission draft DS. A decision on the weight to be given to a consideration is quintessentially a matter of judgment and not a subject for judicial review. So, the Claimant puts its case in two ways. First, it is said that the CBC failed to take into account and apply the whole of paragraph 216 of the NPPF, which provides:-

> "216. From the day of publication, decision-takers may also give weight to relevant policies in emerging plans according to:
>
> - the stage of preparation of the emerging plan (the more advanced the preparation, the greater the weight that may be given);
>
> - the extent to which there are unresolved objections to relevant policies (the less significant the unresolved objections, the greater the weight that may be given); and
>
> - the degree of consistency of the relevant policies in the emerging plan to the policies in this Framework (the closer the policies in the emerging plan to the policies in the Framework, the greater the weight that may be given)."

LBC argues that although CBC applied the third intention (consistency of the emerging plan with the NPPF) it failed to apply the first two criteria (the stage reached by the emerging plan and the extent to which there are unresolved objections to relevant policies). Secondly, it is contended that CBC's judgment that "substantial weight" be given to the draft DS is irrational.

121. CBC and the IP submit that CBC's decision was not irrational given the context especially the history of the policies dealing with the extension of the conurbation. CBC and the IP also argue that none of the criteria in paragraph 216 of NPPF had primacy and that, in any event, the assessment of the weight to be attached to the emerging strategy is the light of objections thereto.

Discussion

122. I deal firstly with the application of paragraph 216 of NPPF. In his reply, Mr Village submitted that the essential point was that the first criterion had not been applied by CBC. I cannot accept that contention. The August 2013 OR plainly assessed the weight to be given to the emerging strategy by reference to the stage it had reached. For example, at page 49 of the report the Strategic Planning and Housing team leader

advised the Committee that a decision to grant planning permission for development on this scale before completion of the plan-making process should not be undertaken lightly, if the integrity of the plan-led system is to remain; there would need to be significant benefits to the public interest to justify any such decision. He then added that there had been no groundswell of public opinion against the proposal, going back over 7 to 8 years, and that objections from the development industry had been relatively limited, proposing new sites in *addition* to, rather than in *substitution* for, Houghton Regis North.

123. Furthermore, CBC's evaluation of the weight to be given to the proposal in the draft DS to allocate the HRN1 site would have been influenced by the analysis in the officers' report of the evaluation of the policy strategy for sustainable urban extensions to the conurbation (see below).

124. As to the second criterion, Mr Village QC acknowledged in his reply that the September 2013 OR had addressed objections to the allocation of the site in the draft DS and had advised members that:

> "the significance that can be attributed to [the allocation] must be *limited* by reason of the fact that there are currently objections to the identification of the site on Development Strategy – in particular from Luton Borough Council" (emphasis added)

Mr Village suggested that this conflicted with the advice in the main report to give "substantial weight" to the strategy, or was otherwise confusing. But I see no such difficulty. As I explain under ground 3 below, the decision to give "substantial weight" overall to the draft strategy properly took into account a range of factors. Here, the officers were merely stating, as they were entitled to do, that that weight, albeit substantial, was to some degree limited by the outstanding objections (i.e. it was less than it would otherwise have been).

125. For completeness I deal with LBC's submission recorded at the end of paragraph 35 above. It has to be remembered that CBC was deciding the weight to be attached to the draft DS for the purposes of determining the IP's application, not for all purposes. It had to do so in the context of the representations it received on the application. It is significant that in its representations to CBC, LBC raised non-compliance with the duty to cooperate only briefly and without linking that point to the weight to be attached *in this case* to the draft DS, notwithstanding that it had ample opportunity to comment on the August 2013 OR. Applying the tests in Oxton and Fabre, I do not see how CBC's decision can be criticised on this ground. The essential point is that CBC did address all of the substantial points raised by LBC.

126. Mr Village QC accepted in his reply that the third criterion in paragraph 216 had been taken into account by CBC. Paragraphs 64 and 67.3 of the Claimant's Skeleton argue that the last sentence of paragraph 5.35 of the main report is circular and self-serving. Although the sentence appears to give "the [i.e. sole] reason" for according substantial weight to the draft strategy, it is clear from a fair reading of both of the officers' reports that CBC did take into account and apply the whole of paragraph 216 of the NPPF. In any event, I do not follow LBC's criticism. The sentence complained of was merely an evaluation in accordance with the third criteria in paragraph 216.

127. I turn to consider the irrationality argument. I would make the preliminary observation that expressions such as "substantial weight", or for that matter "limited weight", do not have some uniform meaning, or even carry some numerical evaluation. Their significance depends upon the particular context in which they have been used. They often represent no more than a summary expressing how the decision-maker has pulled together a number of judgmental factors. It is difficult to see how in the present type of case a rationality challenge could succeed merely on the basis that a decision-maker has decided to give "substantial weight" to a policy. Instead, the challenge ought to be directed to the process of reasoning which has been adopted.

128. This is in fact acknowledged by the Claimant in paragraph 63 of its skeleton, in which it is asserted that "in all circumstances" the judgment was irrational, but unfortunately without identifying any circumstances which would support that argument. I raised this question with Mr Village, who answered by saying that "no authority properly applying paragraph 216 of the NPPF could properly give substantial weight in the light of the factual circumstances." Given the conclusions I have set out on paragraph 216, the irrationality argument as advanced during the hearing before me appears to add nothing further.

129. I will, however, summarise how I understand the reasoning set out in the report. That reasoning must be understood as a whole.

130. First, in relation to the statutory development plan, the South Bedfordshire Local Plan Review 2004, is not up to date in terms of compliance with the NPPF (paragraph 5.36). The draft DS has been designed so as to accord with the NPPF and its policies on housing, employment, retail, infrastructure and delivery and therefore should be given greater when compared with the 2004 plan (paragraph 5.33). That conclusion is directly relevant to the last sentence of paragraph 5.35 criticised by LBC. Second, paragraphs 4.1 to 4.4 of the report explained why "some weight" should be given to the withdrawn Joint Core Strategy. That conclusion must have had some regard also to paragraph 3.10(2) of the report (that the reasons for withdrawal did not impinge on the merit of HRN) and to the evidence base upon which that strategy had been based (see e.g. paragraphs 4.1, 4.2 and 11.4). Page 49 of the report explained that greater weight should be given to the draft DS given the time which had elapsed since the Joint Core Strategy and the progress made (see also paragraph 2.1). Third, CBC's judgment was influenced by the carrying forward of the draft allocation from the Joint Core Strategy to CBC's draft DS. Fourth, the report carefully considered relevant policies of the NPPF and decided that greater weight should be given to the NPPF than to the draft DS.

131. I can see nothing irrational in that series of evaluations made by CBC, and indeed no specific submission to the contrary was made. Accordingly, I reject the contention that the judgment made in the officer's reports to give substantial weight to the draft DS was irrational.

132. There remains one further point which was raised in an email to the Court from LBC's Counsel on 8 December 2014, after the hearing had been concluded. Attached to the email was a letter dated 3 December 2014 to CBC from the Inspector conducting the examination into the submitted version of CBC's draft DS. The hearings have yet to begin, but, following a common procedure, the Inspector has set

out his "initial views" on whether the strategy is legally compliant and sound and on whether CBC has complied with the duty to co-operate. The last matter is important because if the Inspector should reach a *final* conclusion that the duty has not been satisfied, then under the Planning and Compulsory Purchase Act 2004 it will not be possible for the strategy to be adopted. Although the Inspector has stated that he has "significant concerns", he has also made it plain that he has "yet to hear your full response" and, of course, the issues he has raised have yet to be examined at the public hearing.

133. In paragraph 26 of his letter the Inspector has also raised an issue as to the amount of affordable housing which the strategy may deliver in order to meet LBC's unmet needs, given that the policy requirement for up to 30% affordable homes is subject to viability testing and that the strategic mixed-use allocations (not just HRN) are associated with infrastructure requirements. Whereas the duty to co-operate and "objectively assessed housing need" are to be dealt with in the initial hearing sessions (paragraph 3), other issues (including those raised in paragraph 26) would be covered in any subsequent hearings. I also note that the Inspector's initial view is that most matters going to the issue of the "soundness" of the plan "seem capable of being resolved" through the "Main Modification" procedure.

134. I have read the Inspector's letter as a whole along with the email submissions from all Counsel, for which I am grateful. By definition, the letter constitutes material which post-dates the decision which LBC is challenging, and was not before CBC at the material time. According to R v Secretary of State ex parte Powis [1984] IWLR 584 it is inadmissible in these proceedings. The email from LBC's Counsel of 9 December at 9:17am does not really address that principle. It is said that the Court is not being asked to endorse the Inspector's concerns or to speculate on the likely outcome of the examination; that is a matter for the Inspector. Plainly that is correct. Instead, it is suggested that the letter confirms an "entirely predictable consequence" of LBC's objections to the draft DS as at the date of CBC's decision to grant planning permission. It is submitted that the legal consequence for these proceedings (and the only consequence identified) is to provide the "clearest confirmation" that CBC's decision to accord "substantial weight" to the DS was perverse.

135. I do not accept LBC's submissions for several, independent reasons. First it has not been explained how, in the face of ex parte Powis, this new material could support the rationality challenge. Second, as I have said the merits of that challenge depend critically upon a proper understanding of what "CBC" meant by "substantial weight". I have summarised CBC's reasoning on the matter and I do not see how the new material undermines the rationality of that reasoning. Third, although not raised in the recent emails, I have also considered the new ex post facto material in the context of the first and second criteria of paragraph 216 of the NPPF. I have explained why, on a fair reading of the reports to Committee, I consider that CBC properly took those criteria into account in a manner which cannot be impugned. One reason why the Committee was advised that permission for HRN1 should not be granted unless there were "significant benefits to the public interest" (p. 49 of the August 2013 OR) was because of the need to respect "the integrity of the plan-led system" … when determining the HRN1 application at this stage of the plan-making process. CBC had well in mind possible outcomes of that process. Fourth, although in its letter of 27 August 2013 LBC expressed the view that only "little weight" should be given to

policies in the emerging plan relating to Houghton Regis, and although the letter was written with the benefit of legal advice and warned that a judicial review would be brought if planning permission were to be granted, it was not suggested that CBC could not give "substantial weight" to its strategy, on the basis explained in the August 2013 OR (and as clarified by the September 2013 OR).

136. I reach the firm conclusion that the issues raised under ground 3 were all matters for the planning judgment of CBC and are not open to legal criticism. That view is not altered by the recent letter from the Inspector dated 3 December 2014. I should add that I do not accept the forensic submission in the email of 9 December 2014 that the planning system would be brought into disrepute if the draft strategy should subsequently be "thrown out (or withdrawn)" on grounds which were before CBC at the time of its decisions. It is plain from the officer's report that CBC judged that planning permission should be granted for HRN1 because of a combination of very important benefits which clearly outweighed the disbenefits, and having regard also to the history of plans for the release of sustainable urban extensions from the Green Belt including HRN.

Ground 5

Submissions

137. LBC criticises the statement in paragraph 3.10 (6) of the August 2013 OR:-

> "Delaying a decision or refusing the planning application on Green Belt grounds until the adoption of the Development Strategy and the formal confirmation of the planning allocation in the Development Plan will serve no good purpose, other than to delay much needed housing and employment opportunities for the area and set back the delivery of the M1-A5 link road and Junction 11a works…"

It is said that this implied that the future adoption of "relevant parts" of the draft Strategy was "inevitable" or expressed a "degree of total certainty" (sic). The "relevant parts" are a reference to the proposal in the strategy to allocate this particular site, rather than to the strategy as a whole. LBC argues that the implicit view that allocation was inevitable or certain was irrational. That is the sole basis of the challenge under ground 5.

Discussion

138. I do not accept the construction which LBC places upon paragraph 3.10(6) of the August 2013 OR. The complaint also reveals the danger of reading such a passage in isolation and not by reference to the report as a whole.

139. First, this paragraph appears in the section of the report dealing with "very special circumstances" (paragraphs 3.9 to 3.20), which concluded that the scheme would deliver very substantial benefits in the public interest. Second, CBC had well in mind the "substantial body of evidence" from work on previous plans and the overall draft strategy pointing to the need to release the site from the Green Belt for the expansion of the urban area (e.g. paragraphs 3.1, 3.10 (2), 4.1, 4.2 and 11.4). Third, the

members were entitled to take into account the limited opposition to the proposal and advice that "it is very difficult to envisage a strategy to meet housing needs that does not include, in some form, development of this site" (p. 49 of the August 2013 OR). The tone of the report was not to suggest that the allocation of the site was, as Mr Village put it, a "foregone conclusion", but nevertheless something which was highly likely, given the needs requiring to be met, the planning history and the representations made. Fourth, the true focus of the sentence criticised by LBC is the prejudice which would be caused by *delaying* a decision on the proposals to develop the site. These were all matters for the judgment of CBC.

140. I find no basis at all for impugning this part of the report, whether on the grounds of irrationality or otherwise, and I therefore reject ground 5.

Ground 2

Submissions

141. LBC argues that the decision to grant planning permission was unlawful because CBC failed to consider (a) alternative sites for the development of necessary housing (and the related uses) or (b) alternative strategies for the development of HRN1. Submission (b) assumes that the site *is* released for development, but in that event LBC contends that the amount of housing provided, and therefore affordable housing, should have been increased. Only two alternative strategies were put forward before the court. First, it was said that the size of the contribution from the development to the Department for Transport to the cost of the A5-M1 link road should have been reduced below £45m, so that additional funding would have been available for more affordable housing. Second, it was said that the amount of land devoted to retail development should have been reduced, and that would have enabled more housing development to be carried out.

142. In summary, Mr Village QC submitted that CBC's decision should be quashed because

i) CBC had been obliged as a matter of law to consider alternative sites and had failed to do so; or

ii) It had failed to consider whether, as a matter of discretion it should address alternative sites; or

iii) In paragraph 11.4 of the August 2013 OR CBC did embark upon a consideration of alternative sites but carried out the exercise inadequately; or

iv) CBC failed to consider either of the alterative Strategies for the HRN1 site identified above.

Under (iii) LBC referred to the non-technical Summary of the Environment Statement (paragraph 4.1), from which it is clear the developer did not consider alternative sites.

143. CBC and the IP submitted:-

i) LBC did not raise alternative sites as an issue to be addressed by CBC before the decision to grant planning permission was taken;

ii) This case did not fall into the exceptional category in which the planning authority was obliged as a matter of law to consider alternative sites;

iii) There was no separate obligation to consider *whether* to address alternative sites;

iv) The references in the officer's report to the "evidence base" did not involve any acceptance by CBC that it should consider alternative sites and, in any event, there was nothing inadequate about the assessment made in the officer's reports;

v) CBC did not make any error of law in relation to alternative strategies.

Discussion

144. Before coming to the case law on alternative sites, I begin by examining the extent to which LBC raised the matter in its representations to CBC on the planning application.

145. In paragraph 15 of its representations dated 15 September 2012 on a consultation draft of CBC's DS, LBC urged CBC to consider all possibilities for "*extra* growth" near to Luton, including to the west "*in addition* to the proposed urban extensions contained within the Development Strategy" (including HRN). That statement was unequivocal. LBC did not ask for sites to be considered as alternatives, or substitutes, for HRN. Instead, it was seeking more sites in addition to those proposed by CBC for allocation. Paragraphs III to V of the "Summary of Comments" in the same document can only be read in the same way, having regard to paragraph 15.

146. On 15 April 2013 LBC sent representations to CBC both on the pre-submission version of the latter's draft Strategy and on the HRN1 planning application. Paragraph vi of the Summary of Comments relied upon LBC's earlier comments in September 2012 and repeated its request that sites for accommodating "additional growth to the west of Luton" be considered. There was no suggestion in those representations that CBC should examine the sites as alternatives to HRN. LBC did state that it would oppose the release of HRN1 unless three requirements were met, including the provision of more housing and a reduction in retail floorspace (on retail impact grounds), but plainly its objective was to secure a change in the package of land uses within the site. That had nothing to do with the issue of alternative sites at all.

147. Even LBC's last minute letter of 27 August 2013 chose not to raise the issue of alternative sites. Instead, having acknowledged that the A5 – M1 link road "may well be needed for this development to go ahead", LBC merely argued that the scheme should contribute less than £45m to the costs of that road (without identifying any figure) so that the amount of affordable housing could be increased. That simply represented an alternative *strategy*, on the assumption that the site would be released as an urban extension. It was not suggested during the hearing that any other party raised the issue of alternative sites.

148. There has been no suggestion that the officers reports misled the Committee as regards LBC's stance on alternative sites. But more importantly, it is highly

significant that a neighbouring planning authority which had worked with CBC for several years on the identification of land to meet housing and other needs did not think it appropriate to suggest that substitutes for HRN1 should be considered, let alone preferred. That accords with the advice of one of CBC's officers that "it is very difficult to envisage a strategy to meet housing needs that does not include, in some form, development of this site" (p.19 of the August 2013 OR). It is much to be regretted that a challenge of this nature should be raised as an afterthought in a claim for judicial review.

149. The first issue is whether in the circumstances of this case, CBC was under a duty to assess alternative sites. Contrary to the submission in paragraph 50.7 of the Claimant's skeleton this is not a case in which "the existence of an alternative site" has been raised, as explained above (see para.36 of South Cambridgeshire District Council v Secretary of State [2008] J.P.L 519).

150. As a general principle an examination of alternative sites is only capable of being a material consideration in exceptional circumstances. It does not fall into the category of considerations which the 1990 Act *mandates* the decision-maker to take into account. Instead, it falls within the category of considerations where it is for the decision-maker to decide for himself what he will take into account, subject to review on Wednesbury principles (paragraphs 20 and 30 of R (Jones) v North Warwickshire Borough Council [2001] PLCR 31; and see also CREEDNZ v Governor-General [1981] 1 NZLR 172 and Re Findlay [1985] AC 319).

151. Those principles were elucidated by Carnwath LJ in Derbyshire Dales District Council v Secretary of State [2010] 1 P&CR 19; [2009] EWCH 1729 (Admin), where he held:-

> "(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, Findlay 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).

152. Turning to the present case, my firm conclusion is that alternative sites were not "obviously material" and that CBC did not act irrationally by failing to assess alternative sites, for a combination of reasons:-

i) It was confirmed in oral submissions on behalf of LBC that housing needs cannot be met unless substantial releases of land are made from the Green Belt;

ii) At no stage before CBC's decision did LBC identify alternative sites or suggest that consideration be given by CBC to looking for substitute sites. Instead, LBC contended that more housing land needed to be released in addition to that proposed in the DS. It has not been suggested that any other party raised alternative sites as an issue;

iii) The Sustainability Appraisal (Table 6) in respect of the draft Core Strategy was available to LBC, but it was not suggested to CBC before the decision that that document indicated that any other site should be preferred to HRN1;

iv) In LBC's skeleton (paragraph 20) it is suggested, post-decision, that sites 8 and 27 in the Sustainability Appraisal should have been considered. But no legal criticism has been made of CBC's appraisal of those sites. Site 8 would have a greater impact on the Green Belt than HRN1 and scores less well overall. Site 27 scores badly in terms of "relationship to housing need". Indeed, it is located to the east of Milton Keynes and Mr Village accepted that it would not assist in meeting housing needs arising in Luton. No satisfactory explanation was given for putting forward site 27 in support of this ground of challenge;

v) The expert view of CBC's officers was that it is highly likely that HRN1 would need to be released in any event (page 49 of the August 2013 OR);

vi) CBC's judgment (paragraph 11.4 of the August 2013 OR) was that the evidence base relating to earlier plans and the Joint Core Strategy "shows there is nowhere else *more suitable* for the growth to go" (emphasis added and see paragraphs 3.1, 4.1 and 4.2);

vii) The withdrawal of LBC from the Joint Core Strategy did not alter the position that it had supported the allocation of HRN in that strategy, which itself had been the subject of a Sustainability Appraisal and Strategic Environmental Assessment;

viii) LBC's two outstanding objections to the HRN1 application focused on increasing the amount of affordable housing that would be delivered from that site for Luton and on reducing the amount of retail floorspace. It was not suggested by LBC that an examination of alternative sites should be conducted in order to address these issues. In effect, those matters were left to be dealt with by CBC on the merits of the HRN1 site itself.

153. I also reject LBC's second submission that CBC's decision should be quashed because of a failure to consider *whether* to examine alternative sites. Mr Village QC sought to support this submission by referring to the body of case law summarised in paragraph 39.2.2 of the Judicial Review Handbook (6th Edition) by Michael Fordham QC dealing with circumstances in which a statutory body has a duty to consider whether or not to exercise a statutory power (see also Stovin v Wise [1996] AC 923, 949). But he accepted that the relevant power here is the power to grant or refuse the application for planning permission. Thus, the submission is, with respect, misconceived because it elevates the ability of a planning authority to treat alternative sites as a potentially relevant consideration into the status of a statutory power.

154. LBC's argument could not be restricted simply to alternative sites. Logically, it would also apply to *any* consideration material to the determination of a planning application. The argument cannot be right. It is contradicted by the analysis in, for example, North Warwickshire Borough Council and Derbyshire Dales District Council which distinguishes between considerations which a decision- maker is *obliged* by the legislation to take into account and those which he *may* take into account. The latter category is not the subject of any "duty to consider".

155. In any event, for the reasons I have already given in relation to the first issue, I do not consider that CBC was under any obligation in the circumstances of the present case to consider whether or not to address alternative sites.

156. Turning to the third issue, I do not accept that in paragraph 11.4 of the August 2013 OR CBC embarked upon a consideration of alternative sites, which it then carried out inadequately. As I have previously explained, the phrase "evidence base" embraces the body of evidence accumulated during the preparation of successive plans supporting the release of land at HRN as an urban extension (see paragraphs 3.1, 4.1 and 4.2 of the report), which would include, but is not limited to, table 6 in the Sustainability Appraisal. I reject LBC's submission, based upon paragraphs 88 to 90 of the judgment of Lindblom J in R (Forge Field Society v Sevenoaks District council [2014] EWHC 1895 (Admin), that the approach taken by CBC in the present case was legally inadequate. In Forge Field Society not only was it common ground that there was an obligation to consider alternative sites (paragraph 85), the planning authority failed to deal with an alternative that it was expressly asked to consider. In the present case, LBC did not raise the issue of alternative sites or identify any alternative site for consideration by CBC.

157. The fourth issue concerns whether CBC failed to address two alternative "strategies". The first strategy relied upon by Mr Village QC was the suggested reduction in the contribution of £45m to the cost of the A5-M1 link road. That was raised in the LBC's letter of 27 August 2013. However, this matter was expressly dealt with in section 4 of the September 2013 OR. The report addressed the criticisms (a) that the contribution was disproportionate having regard to the extent of the anticipated usage

of the link road by traffic related to the HRN1 site and (b) that the latter should not fund the entirety of the funding gap for the link road. The response stated (*inter alia*):-

i) The A5-M1 link, although nationally significant infrastructure, could not come forward without the HRN1 development;

ii) The HRN1 development could not come forward without the A5-M1 link;

iii) The link could not facilitate the HRN1 development unless delivered in its entirety;

iv) If the current viability situation should change then the section 106 obligation contained a mechanism for applying the uplift in value (i.e. to affordable housing);

v) Monies secured from other developments, which come forward in the light of the construction of the link, could be used to fund additional infrastructure, such as affordable housing.

158. Points (iv) and (v) were also explained at pages 97 and 98 of the August 2013 OR. In addition, 8.55 of that report plainly stated that the HRN1 project was dependent upon (*inter alia*) the A5-M1 link and that link had been given "an indication of funding by the Secretary of State for Transport, but only on this basis that there will be a contribution from this development of £45 million…" (see also paragraph 3.11 of the August 2013 OR).

159. Accordingly, CBC proceeded on the basis that without the contribution of £45m towards the A5-M1 link road, HRN1 would not go ahead. Plainly CBC appreciated that that contribution had the effect of reducing the affordable housing contribution from this particular site. CBC decided that that consequence should be accepted when they weighed the merits of the proposal overall and, in particular, the other benefits that the scheme would achieve (including transportation, employment and economic growth in the conurbation). That was quintessentially a matter of planning judgment for CBC with which this Court cannot interfere. The short answer is that CBC disagreed with LBC on this aspect, as they were entitled to do.

160. As to the alternative submission that CBC failed to consider requiring a reduction in retail development so that affordable housing could be increased, there is no evidence that that was ever raised as an alternative strategy for CBC to consider. LBC raised concerns as to the scale of the retail element in an entirely different context, namely impact on town centres, as to which no legal challenge is brought. CBC were under no legal obligation to assess this alternative strategy. I also note from paragraph 19 of the written statement of Jennie Selley that the need for the scale of retail floor space proposed to contribute to the viability of the scheme was explained at the Briefing Meeting for the Committee on 15 August 2013.

161. For the above reasons I reject all aspects of ground 2.

Ground 6

Submissions

162. Ground 6 complains that the officers' reports failed to advise the Committee of a Ministerial Statement dated 1st July 2013 that unmet housing need was unlikely to constitute very special circumstances outweighing harm to the Green Belt. In fact the statement simply states that the "single issue" of unmet housing demand "is unlikely to outweigh harm to the Green Belt and other harm". So the submission was put on the basis that the report had to draw specific attention to that policy statement, in order to avoid misleading members and to avoid the risk of members thinking otherwise.

Discussion

163. This ground is wholly misconceived. It is plain from paragraphs 3.9 to 3.20 of the August 2013 OR that the advice to members was that the very special circumstances comprised a number of substantial planning benefits, including, but not limited to, the meeting of housing need. There is no evidence that any member of the Committee thought otherwise, or even any risk of any member thinking otherwise. The well-established principle referred to in paragraph 15(i) of the Zurich Assurance case ([2012] EWHC 3708 (Admin)) is applicable. This ground is utterly unarguable.

Ground 8

Submissions

164. LBC submit that because the 30,000 sq m of retail floorspace proposed was more substantial than would be required if only the residents in the HRN1 scheme were to be taken into account (paragraph 8.35 of the August 2013 OR). CBC erred in law by failing to consider whether "that element" was justified by very special circumstances. It is also said that in the absence of a need case for the entirety of the retail provision, and absent any good reason for not substituting additional affordable housing, it was impossible for CBC to conclude that very special circumstances existed in relation to that element.

165. Ms. Kabir Sheikh QC for CBC relied upon the decision of the Court of Appeal in Wychavon District Council v Secretary of State [2009] PTSR 19; [2008] EWCA Civ 692 for the following principles on the interpretation of the then national Green Belt policy (which was not materially different to the relevant parts of the NPPF): -

> "(i) "Very special circumstances" connotes a qualitative rather than quantitative test. Rarity may contribute to the special quality of a factor, but is not essential (paragraph 21);
>
> (ii) The policy neither excludes nor restricts the consideration of any potentially relevant factors. The policy limits itself to stating that the balance of such factors must be such as clearly

to outweigh harm to the Green Belt and other harm (paragraph 23);

(iii) Consideration of that balance is a matter for the judgment of the decision–maker on the circumstances of the individual case (paragraphs 23 – 24)."

166. She then submitted that in so far as any part of the proposed retail floorspace is not justified by a retail need case, that would have been reflected in CBC's assessment of harm. In this case, as in others, the Council was entitled to assess the *overall harm* resulting from the development and to compare that harm with the *overall benefits* of the proposal constituting very special circumstances and then to judge whether the latter clearly outweighed the former. In other words, CBC was entitled to strike that planning balance by considering the proposed development in its totality, or holistically. Mr Purchas QC and Mr Richards for the IP made submissions to like effect.

Discussion

167. I accept the submissions for CBC and the IP. There was no effective reply by LBC to those points, which I consider to be correct. The NPPF does not require the planning authority to chop up a mixed use proposal into separate components and to apply the very special circumstances test separately in relation to each such component. No authority was cited to support that interpretation and I do not think that it is justifiable on the language used in paragraph 88 of the NPPF.

168. LBC's alternative argument in paragraph 94 of its skeleton suggests in effect that the proposal actually before CBC should have been rejected by them because of a preference for reducing retail development in favour of a greater amount of affordable housing. That is simply a variant of the "alternative strategy" argument that I have already rejected under ground 2. CBC was not under any obligation to commit that alternative.

169. For the above reasons I reject ground 8 as being wholly unarguable.

Ground 7

Submission

170. It is submitted by LBC that CBC had erred in law because of a failure to disclose to LBC the developer's viability report and the appraisal of that report by CBC's independent consultant E C Harris. The reduced amount of affordable housing in the HRN1 scheme (a minimum of 10%) was the central issue for LBC who wished to test the viability information upon which that level of provision had been accepted. Ultimately by the end of the hearing this ground rested upon two propositions:-

i) Paragraph 5 of the Statement of Agreement enclosed with the letter from CBC to LBC dated 28 March 2013 amounted to a legitimate expectation giving LBC the right to be consulted on the viability reports received by CBC;

ii) Even if LBC had no such legitimate expectation, CBC's failure to disclose the viability material to LBC so as to enable the latter to make representation thereon amounted to procedural unfairness which materially prejudiced LBC. That formulation was based upon paragraph 49 of the decision of the Court of Appeal in Secretary of State for Communities and Local Government v Hopkins Development Ltd [2014] EWCA Civ 470, in substitution for the former "fair crack of the whip" test in Fairmount Developments Limited v Secretary of State for the Environment [1976] 1 WLR 1255.

171. In summary CBC and the IP submitted that:-

i) The Statement of Agreement had not given rise to any legitimate expectation;

ii) The requirement of procedural fairness did not entitle LBC to be given copies of the viability material, even taking into account the position of LBC as an adjoining planning authority, part of whose housing needs fell to be met within CBC's area, or the statutory duty upon both authorities to co-operate;

(ii) In any event LBC's own conduct demonstrates that it had not been caused material prejudice by the conduct of CBC.

Discussion

172. In earlier sections of this judgment I have already set out relevant communications between LBC and CBC. I now summarise what occurred.

173. As far back as 24 December 2012 when the planning application was made, the developer submitted a Viability Statement. A key point made in the planning application submission documents was that the development would not be viable at an affordable housing requirement of 30%. That required a viability appraisal to be conducted as between the developer and CBC so as to satisfy the latter on the level of affordable housing provision at which planning permission could be granted. The financial information supplied to CBC by the DP is commercially confidential as explained in a letter dated 5 March 2013 from its legal adviser and included in the planning application file (paragraphs 9.8 to 9.10 of the August 2013 OR).

174. On 6 February and 20 March 2013 meetings took place between officers of LBC and CBC at which LBC "asked that LBC be provided with the viability evidence to support any reduced affordable housing permission on the HRN1 application site. (Holder WS paragraph 6; Chick WS 2 paragraph 9; Pagodin WS 1 paragraph 11). The only statement or agreement on the part of CBC upon which the Claimant relies pursuant to these requests is that set out in point 5 under "Access to Affordable Rent Housing" in the CBC/LBC Statement of Agreement enclosed with CBC's letter of 28 March 2013:-

> "CBC officers will arrange for LBC officers to be involved at key points in the viability appraisal work and subsequently to meet with the developers of the north of Houghton Regis strategic allocation, to discuss key issues including the

> opportunities to improve delivery of affordable housing on that site"

175. It is not suggested by LBC that that agreement involved any discussion with the developer, who had already claimed confidentiality for the viability appraisal, or that there was any discussion between the authorities as to how that confidentiality could be appropriately protected if that material were to be disclosed to LBC so that it could make representations to CBC, which the latter could take into account when determining the planning application. There is no evidence that either authority addressed or discussed those relevant considerations before the decision to grant planning permission was taken.

176. Although the Claimant's evidence asserts that subsequently "continual requests by LBC" were made (Chick WS 2 para.9), Mr Davie on behalf of CBC says in paragraph 11 of his witness statement that he is not aware of any such requests. Moreover, the contemporaneous material in the bundles before the court do not bear out the assertion. The matter was not raised in LBC's consultation response objecting to HRN1 dated 15 April 2013. The letter to CBC from Councillor Timoney dated 10 June 2013 merely stated "we are awaiting further viability work in relation to the Houghton Regis (HR1) application before the discussions around affordable housing will continue, having noted that "considerable progress" had already been made.

177. On 15 August 2013 Councillor Young wrote on behalf of CBC to Councillor Timoney to confirm the issues that had been discussed at their meeting on 11 August 2013 and how the parties might continue to move forward on these matters. At that meeting CBC provided LBC with an "understanding of the viability issues we must consider as part of the development". LBC was notified that the officer's report to Committee was available on CBC's website from 14 August, that the matter would be dealt with at a meeting to be held on 28 August and that any further representations from LBC would be presented to the Committee if submitted beforehand. The letter contained the following unequivocal passage:-

> "The viability of the development has been rigorously tested by our own viability consultants who have concluded that the S106 and affordable housing package which can be derived from the scheme represents 'a commercial offer' from the promoters which is likely to undercut the profits which they might normally be expected to make. Clearly, viability is impacted by the agreement between the developer and the DfT for the developer to pay a significant contribution towards the A5-M1 link. However, it is also a fact that the market conditions are currently having a significant adverse impact upon the extent of the S106 package which can reasonably be delivered from this application. My officers are therefore recommending that any permission given on this site must be subject to an 'uplift mechanism' which enables the community to share in that uplift, should development values rise significantly in future."

178. From the tenor of that letter and from the officer's report (paragraphs 9.11 to 9.20) it must have been obvious to LBC that CBC was proposing to accept the advice it had

received from E C Harris and that the minimum amount of affordable housing should be set at 10% (but subject to a proposed "uplift mechanism"). If LBC had thought that it had been given a promise or expectation that it would receive confidential viability information and E C Harris's report, and then have an opportunity to make representations on that material, it would have protested straight away that it had been treated unfairly or improperly, asked for that material to be disclosed forthwith and for the Committee meeting to be deferred so that it could make representations in good time. But none of that happened. A reply was sent by Councillor Timoney on 27 August 2013 but it did not raise the non-disclosure of viability information.

179. Indeed, it does not appear from the documentation that that issue was pursued by LBC until a request was made under the Freedom of Information Act 2000 on 4 July 2014, that is to say just over a month after the formal decision notice granting planning permission and only 6 days before the Claim Form in the present proceedings was filed. I note that at that stage the FOI request was made in the knowledge that the planning permission had been granted; it could not have been made in order to enable LBC to make representations to CBC on the planning application.

180. In paragraph 90 of its skeleton argument LBC correctly acknowledges that the disclosure of information which is commercially confidential to the developer would be damaging to that party's interest, but it was submitted initially that there is no reason why disclosure could not have taken place at least to the extent ordered by the First Tier Tribunal of the Regulatory Chamber in London Borough of Southwark v The Information Commissioner and Land Lease (Elephant and Castle) Limited EA/2013/0162.

181. But this line of argument does not assist the Claimant in the present case, as Mr Village QC did acknowledge. First, that case was concerned with the obligation to disclose information under the Environmental Information Regulations 2004. It is accepted that disclosure under that legislation would be to the general public and not just to LBC (see e.g. Regulations 4 and 5). Consequently, the exception in Regulation 12(5)(e) relating to commercially confidential information is very much in play, as is evident from the Tribunal's decision. Secondly, the Tribunal refused to order disclosure of material of the kind which LBC now says it would have wished to review (see paragraphs 55 to 56 of the decision).

182. It is well-established that (a) material of this kind is to be treated as confidential in the process for determining a planning application, (b) the Court is most unlikely to order disclosure of such material in a judicial review and (c) non-disclosure does not afford a ground for challenging a grant of planning permission, whether because of procedural unfairness, irrationality, or otherwise (see e.g. R (Bedford) v Islington LBC [2002] EWHC 2044 (Admin) (paragraphs 99 to 102); R (English) v East Staffordshire Borough Council [2010] JPL 586; R (Perry) v Hackney LBC [2014] JPL 1329 (paragraphs 23 to 36); R (Perry) v Hackney LBC [2014] EWHC 3499 (Admin) (paragraphs 48 to 51, 64 to 65 and 86 to 100). No submissions were made in this case to challenge the correctness of these decisions or the principles they lay down.

183. In the light of the above, Mr Village QC confirmed that ground 7 depends upon LBC's arguments relating to (a) legitimate expectation and (b) procedural unfairness because of LBC's "special position".

184. Mr Village QC submitted that point 5 in the Statement of Agreement sent by CBC on 28 March 2013 amounted to a promise of consultation on the confidential viability information before the application was determined (i.e. category (b) in paragraph 57 of R v North and East Devon health Authority ex parte Coughlan [2001] QB 213). That should involve an examination of the precise terms of the statement relied upon, the circumstances in which the promise was made and the nature of the statutory or other discretion (paragraph 56). It is also relevant that the expectation relied upon is said to have been owed to LBC alone (paragraph 59). Consequently there is no dispute that the expectation relied upon had to be sufficiently certain in relation to the disclosure of *confidential* material.

185. The terms of the Statement of Agreement must be considered in context. In the circumstances, LBC ought to have been aware that the material the subject of ground 7 was confidential and that that confidentiality belonged to the IP. The Agreement followed the letter of 5 March 2013 from the IP's legal advisor which was available on the planning application file. In any event, LBC ought to have been aware of the approach taken to confidentiality in cases such as Bedford and English. Indeed, it would be most surprising if LBC had not encountered this issue before in its dealings with developers in carrying out its own development management functions. The Professional Guidance Notice: Financial Viability in Planning, paragraph 4.3.1 of which was relied upon in paragraph 9.1 of Mr Moriarty's second witness statement, was issued by the RICS in August 2012.

186. Against that background two things should have been plain to LBC when discussing with CBC the terms of the Statement of Agreement. First, those terms needed to state expressly that LBC would have access to *confidential* information of a kind which ordinarily would not be disclosed by CBC to other parties. Second, unless the IP was involved in the process, it might object to the release of that information to LBC. Alternatively, any willingness on the part of the IP to share information with LBC is highly likely to have been dependent upon agreeing procedures for determining what material would be disclosed to LBC, how the confidentiality of that material and representations thereon by LBC would remain protected and how any such representations would be taken into account by the Committee. From the evidence before the Court none of those matters was addressed at any stage before the agreement was made, or before CBC's decisions were taken.

187. Accordingly, in my judgment the terms of the Statement of Agreement, when read in the context set out above, was inadequate to create a legitimate expectation that LBC would be entitled to receive and make representations on confidential viability information. The text only promised to "involve" LBC "at *key points* in the viability appraisal work and subsequently to meet with the developers…" to discuss "*key issues* including the opportunities to improve delivery of affordable housing on that site." "Key points" simply referred to stages in the handling of the planning application. The phrase "to discuss key issues" was plainly insufficient to create a promise or expectation that commercially confidential information would be disclosed.

188. Although it is unnecessary to my conclusion on this point, I am reinforced in my view by the subsequent conduct of LBC. At no stage before the decision to grant planning permission was made did LBC give any indication that in its view (putting legal analysis to one side) CBC had broken a promise.

189. There remains the second question of whether what occurred amounted to procedural unfairness causing material prejudice to LBC. As I have previously explained, this argument is put forward solely on the basis of LBC's special position, namely that the satisfaction of Luton's housing needs was dependant in part upon securing provision, particularly of affordable housing, in Central Bedfordshire, which was supported by the statutory duty to co-operate in preparing development plans.

190. Certain matters are not in dispute. First, CBC did obtain viability information from the IP and subjected that material to independent scrutiny. That course accords with paragraph 65 of the judgment of Patterson J in the second Perry case. CBC followed good practice. Second, the relevant factors affecting the viability appraisal were summarised in the publicly available part of the August 2013 OR; commercially sensitive material and the report by EC Harris was provided to the members of the Committee in the confidential section of the report. Those matters were taken into account by the decision-maker. Third, it was understood between the two authorities that the affordable housing provision on the HRN1 site would be split 50/50 between their two respective areas. Consequently, CBC itself had a significant interest in testing the viability information supplied to it by the IP in order to maximise affordable housing towards meeting the needs of its own area.

191. Accordingly, the real nature of LBC's complaint is that it did not have the opportunity to examine the viability appraisal itself, not merely so that it could make its own assessment of that material in parallel with that of CBC, but also so that it could make representations to CBC which would be taken into account in the decision on the planning application. Mr. Village QC accepted that in order to protect confidentiality such representations would have had to be put to the Committee in the confidential part of their papers. That underscores the point that the obligation of fairness claimed by LBC would apply to it alone. No other participants in the process, apart from the IP, would have been entitled to see those representations.

192. In assessing this argument I have regard to paragraphs 99-100 of the judgment of Ouseley J in the Bedford case and to paragraph 91 of the judgment of Patterson J in the second Perry case, from which the following principles are plain:-

i) Fairness in the planning process is not confined to considering the interests of objectors, or just LBC. Fairness also has to respect the position of the applicant as regards the confidentiality of commercially sensitive information which he supplies to the decision-maker;

ii) The decision-maker needs to be able to examine such matters with applicants in a confidential manner and if independent consultants are instructed any disclosure to them of the material should be made in confidence;

iii) If such confidentiality is not respected then the decision-maker will be hindered in its negotiations with developers over the content of publicly beneficial packages such as the extent of affordable housing. The public interest would be harmed.

193. Given these principles, the special position upon which LBC relies could not have been sufficient by itself to impose an obligation of disclosure upon CBC and to receive confidential representations from LBC. Nor did such an obligation arise

merely because in February and March 2013 LBC made requests to be supplied with "the viability evidence to support any reduced affordable housing." Requests of that general nature did not engage with the imperative principles set out in the Bedford case. One way of dealing with the situation would have been to discuss and agree a protocol on disclosure involving the IP. That was not done. There is no evidence of LBC pursuing that approach with CBC or even seeking confirmation from CBC that commercially confidential would be made available to it, or to define the information it would receive.

194. It is a truism that the requirements of fairness are highly fact sensitive. In the circumstances of this case, I do not consider that it can be said that the procedure followed by CBC was unfair to LBC.

195. Moreover, I do not think that LBC can legitimately claim to have suffered unfairness causing them material prejudice. In George v Secretary of State [1979] 77 LGR 689, 695 Lord Denning MR stated that "there is no such thing as a technical breach of natural justice… You should not find a breach of natural justice unless there has been substantial prejudice to the applicant as a result of the mistake or error which has been made." In the present case, LBC took no steps whatsoever to raise the non-disclosure of viability information in August 2013 when the officer's report became available, or indeed subsequently until the FOI request was made in July 2014, after CBC's grant of permission. No real evidence has been put before the Court to explain why that is so. The matter ought to have been raised by August 2013 at the very latest, bearing in mind that the procedure followed by CBC had to be fair to the IP as well as other participants. I can see no justification for the delay in the point being raised, with all the potential that has had to cause prejudice to the IP, least of all when the Claimant is itself a planning authority.

196. For all these reasons I reject ground 7.

Ground 9

Submissions

197. LBC complains that CBC failed to apply lawfully the sequential test in paragraph 24 of the NPPF in relation to the retail element of the proposed development. In essence the test requires that main town centre uses should be located in town centres, then in edge of centre locations and only if suitable sites are not available should out of centre sites be considered. Paragraph 27 states that where an application fails to satisfy the sequential test, "it should be refused".

198. Having said that, it is plain, and not disputed by LBC, that a failure to comply with the sequential test does not have to result in a refusal of permission. As a matter of law the planning authority is entitled to decide that there are other factors in support of granting permission to which they may attach more weight than the breach of the sequential test.

199. The IP supplied a Retail Assessment, section 6 of which dealt with the sequential test. LBC relies upon a review of that assessment in section 3 of a report prepared in June 2013 by CBC's independent consultants, Turleys. Those consultants agreed that the appropriate centres to be included in "the sequential search" were Houghton Regis

and Dunstable (paragraph 3.11). Turleys pointed out that the proposed retail floorspace was likely to meet the needs not only of the local resident population but also "a much wider area than just Houghton Regis (paragraph 3.10). Turleys made a number of criticisms of the IP's assessment, including "the approach adopted… in assessing alternative sites demonstrates limited flexibility in applying the sequential approach and does not provide a robust assessment…" (see also paras. 3.16 and 3.17). Turleys identified a site in Dunstable, the Quadrant, which should be considered further (paragraphs 3.30-3.32). The consultants' overall conclusion to section 3 (paragraph 3.37) suggested that the applicant might provide further material to justify its approach. But Mr Village QC stated that that was not done and I proceed on that basis.

200. Paragraph 8.40 of the August 2013 OR quoted the entirety of Turley's concluding chapter 5, entitled "Principal Findings and Recommendations" (paragraphs 5.1 to 5.11). Paragraph 5.4 summarises the gist of paragraphs 3.16, 3.17 and 3.37. In opening LBC's case, Mr Village confirmed that there is no suggestion that the officer's report was significantly misleading in reporting the views of the Council's independent consultant applying the test in Oxton. In my judgment that must be correct.

201. Instead, LBC's criticism is that given the statement in the "Reasons" for the grant of permission in the decision notice of 2 June 2014 that the proposal "complies with the National Planning Policy Framework", it is impossible to discern in the face of Turley in the NPPF had been passed (paragraphs 101-102 of LBC's skeleton).

202. CBC submits that in paragraphs 5.5 and 5.6 of Turleys' report, set out in full of the August 2013 OR, the consultants recommended that the Members reach a decision on the application by striking an overall balance between positive and negative impacts. They stressed the importance of balancing adverse and *beneficial impacts* in reaching a judgment as to whether there are considerations which would outweigh any adverse impacts of the proposals. Members were directed to the summary of the benefits of the scheme in the IP's submission documents. Read in context (e.g. the phrase "positive impacts") it is plain that by "impacts" Turleys meant "effects"; so that "adverse impacts" was not limited to the retail impact test in paragraph 26 of the NPPF. Finally, in section 3 of the September 2013 OR, members were specifically directed to consider extracts attached from Turleys' report, including paragraphs 3.35 to 3.37 and 5.1 to 5.11. The officers' reports were not misleading.

Discussion

203. In essence I accept the submissions for CBC.

204. To put the matter into context, I note that LBC did raise objections to the proposal under the retail impact test, that Turleys advised that the proposal was unlikely to cause significantly adverse retail impact and that the officer's report and the Committee proceeded on that basis. However, LBC did not raise any objections under the sequential test, not even in their letter to CBC of 27 August 2013 following the publication of the August 2013 OR with its express references to the Turleys report. Although the owners of the Quadrant Centre in Dunstable did object on the basis that insufficient "sequential testing" had been carried out, it is not suggested that

the report was significantly misleading in the way that that objection was put to the Committee. No further detail was provided to the Court on that aspect.

205. LBC's argument is based upon interpreting a single sentence in the "Reasons" section of the decision notice as indicating that the Committee were satisfied that the sequential test had been satisfied. That argument is misconceived. First, when the former obligation to give reasons applied, the requirement was only to give "summary reasons". Second, the position is not substantially different from when a decision-maker decides that a proposal accords or complies with the statutory development plan (for the purposes of section 38(6) of the Planning and Compulsory Purchase Act 2004). That is a judgment which should look at the plan as a whole; some policies may support a proposal and others may point to a refusal (City of Edinburgh v Secretary of State for Scotland [1997] 1 WLR 1447). The analysis is no different when a decision-maker states that a proposal complies with the NPPF. That may well be a judgment, as here, that the proposal accords with the NPPF as a whole, or taken overall. It cannot be inferred without more that the decision-maker has necessarily formed the view that the proposal complies with each and every policy in the NPPF.

206. Instead, the correct legal approach is to assume (as in paragraph 15(i) of the Zurich Assurance case [2012] EWHC 3708 (Admin)) that the Committee followed or adopted the reasoning of the report. There is no evidence to suggest otherwise. On that basis it is plain that the members were invited to proceed on the basis of Turleys' views as set out in section 5 of their report and as quoted in paragraph 8.40 of the August 2013 OR. In other words, they struck a balance between the overall benefits and disbenefits of the scheme, including the failure to satisfy the sequential test completely. It is to be noted that paragraph 5.5 of Turleys' Report was underlined in the officer's report. The point could hardly be clearer; but in any event it is also confirmed by paragraph 23 of the witness statement of Jennie Selley.

207. Ground 9 is wholly unarguable. In the light of the reasons given above I do not think it is necessary, nor would it be appropriate for me to deal with the submissions made on whether paragraph 24 of the NPPF does or does not allow for "disaggregation". Further argument on the point would have been necessary.

Ground 10

Submissions

208. LBC submits that CBC failed to apply sequential and retail impact tests in respect of I proposed main town centre uses, notably 5000 m^2 of office space, a 3000 m^2 hotel, and a 3000 m^2 cinema. LBC accepts that it did not raise these points at any stage before the decision to grant planning permission, but relies once again on the decision in Kides. LBC does not suggest that any other party raised these points.

Discussion

209. I accept the submissions of CBC and the IP that this ground is quite unarguable.

210. As I have explained previously, the Kides decision is concerned with standing, but that is not the issue here. The true issue is whether the planning permission should be struck down simply because the officer's report did not mention these particular

matters. The relevant principles for that purpose are contained in Oxton and Fabre. It was a matter for the judgment of the officers as to whether to include issues of this nature in their report. Applying a measure of common sense, these land uses formed a relatively small part of a 262 hectare sustainable urban expansion which would be expected to contain a sustainable mix of uses in any event (see e.g. paragraph 93 of the IP's skeleton). CBC approached the lack of robustness in the sequential testing of *retail* floorspace as a matter to be put in the overall planning balance. It is perfectly plain from their report that officers, and likewise members, considered that the very substantial benefits of the scheme clearly outweighed any harm. The non-inclusion in the officers' report of sequential and impact tests in relation to non-retail main town centre uses, where no particular issues had been raised on these matters, cannot be faulted in law. I reject ground 10.

Conclusion

211. Although I have rejected grounds 6, 8, 9 and 10 as wholly unarguable, I consider that the other grounds crossed the threshold of arguability. In order to avoid unnecessary procedural complications in the event of this matter going any further, I will grant permission to apply for judicial review in relation to the claim as a whole. However, for the reasons set out above that claim is dismissed.

Addendum to judgment

212. I now deal with:-

i) The Claimant's application for permission to appeal;

ii) The Claimant's application for an extension of time within which to appeal, or to seek leave to appeal from the Court of Appeal and the IP's opposing application to abridge time;

iii) The IP's application for an order that the costs of Acknowledgment of Service be paid by the Claimant limited to £10,000.

The Defendant and the IP oppose ii). The IP opposes ii) and the Claimant opposes iii). I am grateful for the written submissions of the parties.

Permission to appeal

213. I refuse permission to appeal to the Court of Appeal. I do not consider an appeal would have a real prospect of success. The grounds of challenge have been fully argued during a hearing which lasted 2.5 days. I have found that grounds 6, 8, 9 and 10 were wholly unarguable. I have sought in the judgment to deal with each of the various arguments raised by the Claimant in some detail. The application for permission does not identify any omission or error in the judgment which the Claimant would seek to argue in the Court of Appeal. It badly seeks permission to appeal "across the board" relying upon "the arguments put forward in support of the application".

214. I do not consider that any other compelling reason as to why the appeal should be heard has been given. The fact that the planning permission is for a very substantial

development on a very large area of Green Belt is not a "compelling reason" to justify an appeal from a decision on judicial review. The same applies to the Claimant's objective of securing as much affordable housing as possible. These matters go to planning merits, a matter for the decision-maker.

215. I do not consider that this case raises important questions of planning law and practice which, in the public interest, should be considered by the Court of Appeal. Most of the challenge depended upon a detailed review of lengthy reports by officers to Committee, in the light of the representations made to the Defendant on the merits of the planning application, particularly those made by the Claimant itself. The challenge did not involve the Court ruling on the *construction* of the NPPF as opposed to the *application* of that document (see e.g. paras 122 to 128, 163, 167-8, 203-7 and 209-10).

216. I cannot see any basis for granting permission to appeal on only some of the grounds of appeal (as suggested at the end of paragraph 2 of the application).

Time limit for appealing

217. It is most unfortunate that this project, which will deliver much needed development and nationally important infrastructure, has been delayed by a challenge lacking in legal merit.

218. I acknowledge that judgment is being handed down on Friday 19 December 2014 shortly before a substantial holiday period which may affect not only the availability of counsel, but also of solicitors and the Claimant's officers and members. On the other hand the Claimant's team had the benefit of the draft judgment sent out at 2:37pm on Monday 15 December.

219. In contrast to the Claimant's request to extend the 21 day time limit in CPR 52.4(2)(b) to 28 days, the IP asks the Court to reduce it to 14 days, so as to expire on 2 January 2015. But for the intervening holiday period I would have been very sympathetic to the IP's application.

220. In the circumstances, I think the appropriate balance to strike is that the normal 21 day time limit shall apply. I have asked my clerk to communicate that decision to the parties during the morning of 18 December 2014.

The costs of the IP's Acknowledgement of Service

221. The general principle in Bolton against multiple sets of costs does not apply to costs of preparing an Acknowledgment of Service (para. 76 of R (Mount Cook Land Ltd) v Westminster City Council [2004] 2 P&CR. 22 and per Walker J in R(Kenyon) v Wakefield Council [2013] EWHC 1269 (Admin)).

222. I have decided that four of the ten grounds were unarguable. If they alone had been pursued permission would have been refused. The IP needed to prepare an Acknowledgement of Service in any event. I do not see why the Claimant should be able to avoid the IP's "Mount Cook" costs in relation to those four grounds, simply because I granted permission on all grounds for the practical procedural reason given in paragraph 211 of the judgment.

223. The agreement on cost capping was between the Claimant and the Defendant. In any event, the application made by the IP respects CPR 45.43.

224. Although with the benefit of substantial oral argument I was able to reject grounds 6, 8, 9 and 10 fairly briefly, at the stage of preparing an Acknowledgment of Service the IP would have had to consider a substantial amount of the supporting material relied upon by the Claimant.

225. Taking into account the Claimant's submissions on the amount of costs, I consider that the proportionate amount which should be paid by the Claimant to the IP in respect of the relevant part of the costs of the Acknowledgment of Service is £7,000.

226. Paragraph 4 of the Claimant's submissions seeks permission to appeal also in respect of the costs order. I refuse permission because neither of the tests in CPR 52.3(6) is satisfied. The exercise of my discretion lies well within the scope of established principles.

Case No: CO/1734/2010

Neutral Citation Number: [2011] EWHC 1840 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/07/2011

Before :

THE HONOURABLE MR JUSTICE SALES

- -

Between :

The Queen (on the application of Michael Maxwell)	**Claimant**
- and -	
Wiltshire Council	**Defendant**
- and -	
Mr & Mrs Martin Walker	**Interested Parties**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Mr Richard Harwood (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Mr Timothy Jones (instructed by **Wiltshire Council Legal Services**) for the **Defendant**

Hearing date: 22/6/11

- -

Judgment
As Approved by the Court

Mr Justice Sales :

Introduction

1. This is an application for judicial review of a grant of conservation area consent dated 14 January 2010 ("the Consent") by the Defendant Council ("the Council") for the demolition of a cottage called "Copsewood" at Low Road, Little Cheverell, Devizes.

2. Little Cheverell is a picturesque, small village, which is designated as a conservation area. "Copsewood" is located down a lane on the fringes of the village. It is set in an attractive garden which is to be retained under the proposed redevelopment of the site.

3. "Copsewood" is owned by the interested parties ("Mr and Mrs Walker"). They wish to demolish the cottage, which is in a state of poor repair and has been for some time, and replace it with a building of broadly equivalent dimensions and appearance but of modern construction. According to estimates they have received, that will be a considerably cheaper way of achieving a cottage which is habitable and in a good state of repair than engaging in the thorough-going renovation work which would otherwise be required if the existing fabric of the building were to be retained. Mr and Mrs Walker have planning permission for the new cottage but also require conservation area consent to proceed with the work, by demolishing the existing cottage.

4. The Claimant is another resident in the village. He objects to the demolition of the existing cottage on the ground that it is an old building, the loss of which and its replacement by what he characterises as a modern pastiche will adversely affect the character of the village.

5. Mr and Mrs Walker's proposal to replace the existing cottage with an equivalent building of modern construction has divided opinion in the village. As appeared from a consultation conducted by the Council, many people in the locality support the proposal while a significant number are opposed to it.

6. There was some debate at the hearing about how old "Copsewood" is. The Claimant maintains that it could date back to the late 18th century, but a surveyor's report commissioned by Mr and Mrs Walker dates it to about the 1860s. It is not a listed building.

7. Mr Harwood, who appeared for the Claimant, submits that the Consent should be quashed on three grounds:

   i) the Council failed to have proper regard to the planning guidance issued by the Secretary of State in Planning Policy Guidance Note 15 ("PPG 15");

   ii) the Council failed properly to consider and reach a conclusion whether the proposal complied with PPG 15 and, if it did not comply, to reach a conclusion why PPG 15 should not be followed;

   iii) the Council acted irrationally and contrary to the statutory purpose of the conservation area regime by concluding that a new building would make a greater contribution to the character and appearance of the conservation area

than the existing building, which the Council acknowledged made a positive contribution to the area.

The statutory and policy context

8. The Council has designated the area of Little Cheverell, including "Copsewood", as a conservation area pursuant to section 69(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Act"), which provides:

> "Every local planning authority –
>
> (a) shall from time to time determine which parts of their area are areas of special architectural or historic interest the character or appearance of which it is desirable to preserve or enhance, and
>
> (b) shall designate those areas as conservation areas."

9. The focus of designation of a conservation area is the characteristics of the area. This may be contrasted with the listing of "buildings of special architectural or historic interest" under section 1 of the Act, where the focus is on the characteristics of a particular building which merits preservation (see also section 16(2) of the Act, which provides that in considering whether to grant listed building consent for works in relation to such a building, the relevant authority "shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses").

10. Section 74(1) of the Act provides that a building in a conservation area shall not be demolished without conservation area consent from the appropriate authority (here, the Council). Section 72(1) of the Act provides, in material part, as follows:

> "72. *General duty as respects conservation areas in exercise of planning functions*
>
> (1) In the exercise, with respect to any buildings or other land in a conservation area, of [the relevant functions], special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area."

11. At the relevant time, national planning policy in relation to listed buildings and conservation areas was contained in PPG 15, which is entitled "Planning and the historic environment". Paragraph 1.1 of PPG 15 provides:

> "*Planning and conservation*
>
> 1.1 It is fundamental to the Government's policies for environmental stewardship that there should be effective protection for all aspects of the historic environment. The

physical survivals of our past are to be valued and protected for their own sake, as a central part of our cultural heritage and our sense of national identity. They are an irreplaceable record which contributes, through formal education and in many other ways, to our understanding of both the present and the past. Their presence adds to the quality of our lives, by enhancing the familiar and cherished local scene and sustaining the sense of local distinctiveness which is so important an aspect of the character and appearance of our towns, villages and countryside. The historic environment is also of immense importance for leisure and recreation."

12. Section 3 of PPG 15 deals with listed building control. So far as material, it provides:

"*Listed building control*

…

3.3 The importance which the Government attaches to the protection of the historic environment was explained in paragraphs 1.1-1.7 above. Once lost, listed buildings cannot be replaced; and they can be robbed of their special interest as surely by unsuitable alteration as by outright demolition. They represent a finite resource and an irreplaceable asset. There should be a general presumption in favour of the preservation of listed buildings, except where a convincing case can be made out, against the criteria set out in this section, for alteration or demolition. While the listing of a building should not be seen as a bar to all future change, the starting point for the exercise of listed building control is the statutory requirement on local planning authorities to "have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses" (section 16). This reflects the great importance to society of protecting listed buildings from unnecessary demolition and from unsuitable and insensitive alteration and should be the prime consideration for authorities in determining an application for consent. …

General criteria

3.5 The issues that are generally relevant to the consideration of all listed building consent applications are:

(i) the importance of the building, its intrinsic architectural and historic interest and rarity, in both national and local terms …;

(ii) the particular physical features of the building (which may include its design, plan, materials or location) which justify its inclusion in the list: list descriptions may draw attention to features of particular interest or value, but they are not exhaustive and other features of importance (e.g. interiors) may come to light after the building's inclusion in the list;

(iii) the building's setting and its contribution to the local scene, which may be very important, e.g. where it forms an element in a group, park, garden or other townscape or landscape, or where it shares particular architectural forms or details with other buildings nearby;

(iv) the extent to which the proposed works would bring substantial benefits for the community, in particular by contributing to the economic regeneration of the area or the enhancement of its environment (including other listed buildings). …

3.11 If a building is so sensitive that it cannot sustain any alterations to keep it in viable economic use, its future may nevertheless be secured by charitable or community ownership, preserved for its own sake for local people and for the visiting public, where possible with non-destructive opportunity uses such as meeting rooms. Many listed buildings subsist successfully in this way – from the great houses of the National Trust to buildings such as guildhalls, churches and windmills cared for by local authorities or trusts – and this possibility may need to be considered. The Secretaries of State attach particular importance to the activities of the voluntary sector in heritage matters: it is well placed to tap local support, resources and loyalty, and buildings preserved in its care can make a contribution to community life, to local education, and to the local economy. …

Demolitions

3.16 While it is an objective of Government policy to secure the preservation of historic buildings, there will very occasionally be cases where demolition is unavoidable. Listed building controls ensure that proposals for demolition are fully scrutinised before any decision is reached. These controls have been successful in recent years in keeping the number of total demolitions very low. The destruction of historic buildings is in fact very seldom necessary for reasons of good planning: more often it is the result of neglect, or of failure to make imaginative efforts to find new uses for them or to incorporate them into new development.

3.17 There are many outstanding buildings for which it is in practice almost inconceivable that consent for demolition would ever be granted. The demolition of any Grade I or Grade II building should be wholly exceptional and should require the strongest justification. Indeed, the Secretaries of State would not expect consent to be given for the total or substantial demolition of any listed building without clear and convincing evidence that all reasonable efforts have been made to sustain existing uses or find viable new uses, and these efforts have failed; that preservation in some form of charitable or community ownership is not possible or suitable (see paragraph 3.11); or that redevelopment would produce substantial benefits for the community which would decisively outweigh the loss resulting from demolition. The Secretaries of State would not expect consent to demolition to be given simply because redevelopment is economically more attractive to the developer than repair and re-use of a historic building, or because the developer acquired the building at a price that reflected the potential for redevelopment rather than the condition and constraints of the existing historic building. …

3.19 Where proposed works would result in the total or substantial demolition of the listed building … the Secretaries of State would expect the authority, in addition to the general considerations set out in paragraph 3.5 above, to address the following considerations:

> (i) the condition of the building, the cost of repairing and maintaining it in relation to its importance and to the value derived from its continued use. Any such assessment should be based on consistent and long-term assumptions. Less favourable levels of rents and yields cannot automatically be assumed for historic buildings. Also, they may offer proven technical performance, physical attractiveness and functional spaces that, in an age of rapid change, may outlast the short-lived and inflexible technical specifications that have sometimes shaped new developments. Any assessment should also take account of the possibility of tax allowances and exemptions and of grants from public or charitable sources. In the rare cases where it is clear that a building has been deliberately neglected in the hope of obtaining consent for demolition, less weight should be given to the costs of repair;
>
> (ii) the adequacy of efforts made to retain the building in use. The Secretaries of State would not expect listed building consent to be granted for demolition unless the authority (or where appropriate the

> Secretary of State himself) is satisfied that real efforts have been made without success to continue the present use or to find compatible alternative uses for the building. This should include the offer of the unrestricted freehold of the building on the open market at a realistic price reflecting the building's condition (the offer of a lease only, or the imposition of restrictive covenants, would normally reduce the chances of finding a new use for the building);
>
> (iii) the merits of alternative proposals for the site. Whilst these are a material consideration, the Secretaries of State take the view that subjective claims for the architectural merits of proposed replacement buildings should not in themselves be held to justify the demolition of any listed building. There may very exceptionally be cases where the proposed works would bring substantial benefits for the community which have to be weighed against the arguments in favour of preservation. Even here, it will often be feasible to incorporate listed buildings within new development, and this option should be carefully considered: the challenge presented by retaining listed buildings can be a stimulus to imaginative new design to accommodate them."

13. Section 4 of PPG 15 deals with conservation areas. So far as material, it provides:

> "*Assessment and designation of conservation areas*
>
> 4.2 It is the quality and interest of areas, rather than that of individual buildings, which should be the prime consideration in identifying conservation areas. There has been increasing recognition in recent years that our experience of a historic area depends on much more than the quality of individual buildings – on the historic layout of property boundaries and thoroughfares; on a particular "mix" of uses; on characteristic materials; on appropriate scaling and detailing of contemporary buildings; on the quality of advertisements, shop fronts, street furniture and hard and soft surfaces; on vistas along streets and between buildings; and on the extent to which traffic intrudes and limits pedestrian use of spaces between buildings. Conservation area designation should be seen as the means of recognising the importance of all these factors and of ensuring that conservation policy addresses the quality of townscape in its broadest sense as well as the protection of individual buildings. …
>
> *Conservation area control over demolition*

> 4.25 Conservation area designation introduces control over the demolition of most buildings within conservation areas (section 74 of the Act)… Applications for consent to demolish must be made to the local planning authority or, on appeal or call-in, to the Secretary of State …
>
> 4.26 In exercising conservation area controls, local planning authorities are required to pay special attention to the desirability of preserving or enhancing the character or appearance of the area in question; and, as with listed building controls, this should be the prime consideration in determining a consent application. In the case of conservation area controls, however, account should clearly be taken of the part played in the architectural or historic interest of the area by the building for which demolition is proposed, and in particular of the wider effects of demolition on the building's surroundings and on the conservation area as a whole.
>
> 4.27 The general presumption should be in favour of retaining buildings which make a positive contribution to the character or appearance of a conservation area. The Secretary of State expects that proposals to demolish such buildings should be assessed against the same broad criteria as proposals to demolish listed buildings (paragraphs 3.16-3.19 above). In less clear-cut cases – for instance, where a building makes little or no such contribution – the local planning authority will need to have full information about what is proposed for the site after demolition. Consent for demolition should not be given unless there are acceptable and detailed plans for any redevelopment. It has been held that the decision-maker is entitled to consider the merits of any proposed development in determining whether consent should be given for the demolition of an unlisted building in a conservation area. …"

14. In these proceedings the Claimant relies in particular upon the cross reference in paragraph 4.27 of PPG 15 to the criteria relating to listed buildings in paragraphs 3.16 to 3.19 and to the presumption in paragraph 4.27 for retention of buildings which make a positive contribution to the character or appearance of a conservation area. The committee of the Council which decided to grant the Consent considered that the existing cottage did make a positive contribution to the character and appearance of the conservation area.

15. The Council, on the other hand, emphasises what was said in paragraph 4.26 about "the prime consideration" for determining a consent application (which reflected the statutory duty in section 72(1) of the Act). As explained below, the committee of the Council considered that the replacement of the existing cottage by a building of equivalent dimensions and design and appearance would enhance the character or appearance of the area. The Council also emphasised that the presumption in paragraph 4.27 in favour of retaining buildings which make a positive contribution to

a conservation area is expressed to be a "general presumption" (rather than, for example, a strict presumption) and that the cross reference in that paragraph to paragraphs 3.16 to 3.19 was expressed as a reference to "the same broad criteria" as are set out in those paragraphs for consideration of proposals to demolish a listed building. Mr Jones, for the Council, submitted that the use of the word "broad" here showed that the guidance in paragraphs 3.16 to 3.19 was intended to operate as a general indication of the approach to be adopted to a proposal to demolish a building in a conservation area and that it was not intended that the guidance in those paragraphs for the approach to demolition of a listed building was to apply with full literal force and effect. To read the policy guidance as the Claimant sought to do, he submitted, would improperly promote individual buildings in a conservation area to the same level of protection as a listed building, even though they were not themselves of such architectural or historical interest as to merit being listed.

16. In September 2007, Kennet District Council promulgated non-statutory planning policy in relation to the conservation area in the form of a document entitled "Little Cheverell conservation area: character appraisal and management proposals" ("the local policy"). In April 2009, the District Council merged with Wiltshire County Council to form the Defendant Council. The local policy remains in effect.

17. The foreword to the local policy included the following:

> "The Council has designated a new conservation area at Little Cheverell in recognition of the architectural and historic interest of the village and the quality of the landscape setting.
>
> Little Cheverell is an attractive and generally well-maintained village of particular interest because of its location at the foot of the northern scarp of Salisbury Plain and in the valley running north. Apart from the effects of traffic the 20th century has made relatively little impact on the village and it remains largely unspoilt, retaining its low density rural character. Trees and the landscape setting are crucial parts of village character. Little Cheverell is generally modest in scale, the higher status houses being largely hidden from view. Much of the village is 18th or 19th century and a number of buildings are listed."

18. The local policy is intended to identify and record those special qualities of the village that make up its architectural and historic character so as to provide a sound basis for planning policies and decisions on development, amongst other things. The local policy emphasises that all the buildings in the village sit within the landscape and refers to the contribution to the appearance of the village made by trees, hedges and green spaces, including private gardens. "Copsewood" was referred to in the local policy in this context, as follows: "Copsewood is located in a mature, riparian garden of great charm and character…". It was also included in a list at Appendix 1 to the local plan of "Locally important unlisted buildings".

19. Section 2.11 of the local policy, headed "Future pressures and capacity for change", included the following statement:

> "Having regard to general planning policy there are unlikely to be any major changes within the proposed conservation area in the foreseeable future but where there are any new proposals or if replacement of existing buildings is under consideration it will be important to ensure that designs have regard to their historic and physical contexts."

20. Section 3.5 of the local policy included the following statement:

> "Applications for planning permission, conservation area consent, and tree works will be assessed with reference to the Conservation Area Appraisal. *There will be a presumption in favour of conserving the key unlisted buildings identified. Where trees, hedges and views are important to the character of the area there will also be a presumption that these should be preserved.*
>
> Following on from the above the preferred policy of conservation for Little Cheverell will be the preservation of the established 'status quo' rather than specific proposals for change. Where proposals for change occur the intention is to provide a framework to allow this to be carefully considered and managed in a positive way to reinforce the existing character and appearance of the area." [Emphasis in original]

The factual background

21. On 27 January 2009 Mr and Mrs Walker submitted applications for conservation area consent and planning permission to demolish and replace "Copsewood". The applications were in due course reported to the planning committee of the Council. The Council's officers recommended rejection of the applications, because the existing cottage made a positive contribution to the character and appearance of the conservation area and, in their view, its demolition would be contrary to PPG 15. The committee, however, decided to grant consent on the grounds that the replacement would not harm the character or appearance of the conservation area but would make a positive contribution to it.

22. The Claimant commenced judicial review proceedings in relation to that decision. Permission was granted for those proceedings on 6 July 2009. The Council then agreed to submit to judgment on the basis that the reasons given for the decision were inadequate, without accepting the other grounds of complaint advanced by the Claimant, and the decision to give conservation area consent was quashed. The application for conservation area consent therefore fell to be re-determined by the Council, acting by its relevant planning committee ("the committee").

23. Council officers prepared a report for committee members for a meeting of the committee scheduled to take place on 14 January 2010 ("the Report"). The officers

again recommended that the application should be refused. Section 2 of the Report provided a summary in these terms:

> "The main issue to consider is:
>
> - Whether the proposal is in accordance with the local planning authority's duty to pay special attention to the desirability of preserving or enhancing the character or appearance of the conservation area.
>
> In considering the above, the national guidance contained within [PPG 15] and [the local plan] are relevant.
>
> Also relevant is the fact that there is an extant planning permission for a replacement dwelling on the site. The committee are entitled to take this into account in determining the application for Conservation Area consent."

24. The Report therefore properly referred to the basic statutory duty on the Council under section 72 of the Act (the first paragraph quoted in para. [23] above), to PPG 15 and the local policy and to the existence of planning permission for the replacement building. The existence of planning permission was relevant to show that it was likely that if the existing cottage was demolished, an equivalent modern replacement would in fact be built in its place – demolition would not simply leave a gap in the landscape: see paragraph 4.27 of PPG 15.

25. The Report contained photographs of the existing building and drawings of the proposed replacement. It set out the view of the conservation officer that, contrary to representations made on behalf of Mr and Mrs Walker, the building made a positive contribution to the conservation area and went on:

> "Therefore, there is a presumption in favour of its retention under PPG 15 and the case put forward is not sufficient to meet the strict demolition tests set out in paras 3.17-3.19 of PPG 15. The application must therefore be refused."

26. The Report summarised the representations received as a result of a consultation by the Council on the proposal to demolish and replace "Copsewood". There were significant levels of both support for and objection to the proposal from members of the public.

27. Section 9 of the Report was headed "Planning considerations". It quoted from PPG 15 as follows:

> "PPG 15 provides clear guidance on assessing proposals for demolition of buildings within a conservation area;

> Paragraph 4.27 states 'The general presumption should be in favour of retaining buildings which make a positive contribution to the character or appearance of a conservation area. The Secretary of State expects that proposals to demolish such buildings should be assessed against the same broad criteria as proposals to demolish listed buildings (paragraphs 3.16-3.19 above).' –
>
> > '3.19 Where proposed works would result in the total or substantial demolition of the listed building, or any significant part of it, the Secretaries of State would expect the authority… to address the following considerations:
> >
> > > (i) the condition of the building, the cost of repairing and maintaining it in relation to its importance and to the value derived from its continued use. …
> > >
> > > (ii) the adequacy of efforts made to retain the building in use. …
> > >
> > > (iii) the merits of alternative proposals for the site. …'"

28. In these proceedings the Claimant criticises the Report for not setting out paragraphs 3.16, 3.17 and 3.19 of PPG 15 in full (see para. [12] above).

29. The Report assessed that the existing cottage made a positive contribution to the character and appearance of the conservation area. It noted its age and described it as "nestled in the valley" on the edge of a wooded area, so as to contribute to the character of Little Cheverell as a rural and unspoilt village. The Report noted that the existing building was clearly in need of renovation and modification works, such as the replacement of its sub-standard, single-storey extension dating from the mid-twentieth century and the complete stripping and replacement of the roof. However, the officers expressed the view in strong terms that there was "scant justification" for the proposal in terms of the guidance in PPG 15.

30. The meeting of the committee took place on 14 January 2010, attended by seven councillors and members of the public. The meeting was addressed by some of the councillors, including in particular Councillor Gamble, and by members of the public.

31. Councillor Gamble is the council member for Little Cheverell and had a particular interest in the application. He had approached the question of conservation area consent with great care. According to his evidence, he had read all the relevant provisions of PPG 15 (which I take to mean that his reading included all the provisions of PPG 15 I have set out above, including the full text of paragraphs 3.16 to 3.19). He had prepared notes for his presentation to the meeting, from which he spoke. He stated his view that "Copsewood" is "a very pretty cottage indeed" in a highly regarded setting and that it makes a positive contribution to the village. He then went on to make the following points set out in his notes:

"Does that mean it cannot be replaced? Well, the Conservation Area Statement [i.e. the local plan] says "*there will be a presumption in conserving the key unlisted buildings identified"*. Quite right! It would be anachronistic to say otherwise. PPG 15 says "*procedures* (for demolition in a conservation area) *are essentially the same as for listed building consent applications"*. We agree, therefore, that demolition is a serious matter and is not to be taken lightly.

Does this mean that demolition is forbidden? The Conservation Area Statement says "*new housing development will be restricted* (inter alia) *to the replacement of existing dwellings"* so it clearly envisages that demolition and rebuilding of a dwelling in the area is a possibility.

PPG 15 says in para 4.26 "*in the case of conservation area controls, account should clearly be taken of the part played in the architectural or historic interest of the area by the building for which demolition is proposed, and in particular of the wider effects of demolition on the building's surroundings and on the conservation area as a whole"*. In para 4.27 it says "*consent for demolition should not be given unless there are acceptable and detailed plans for any redevelopment"*.

So the key questions are,

A. does Copsewood play a part in the architectural or historic interest of the area; and

B. are there acceptable and detailed plans for redevelopment?

Well, Copsewood is not listed as being of special architectural or historic interest. As far as I have read, there are no known historical associations of the building but I do think the building is very attractive from the outside.

It is close inspection which suggests that all is not quite as cute as it seems. The building seems to have had at least three building phases. The newest are only a few decades old and are evidenced by, for example, the breezeblock construction of a bay window and the concrete shuttering lining the inglenook fireplace. The beams are, for the most part, not old English oak or elm but look to me as if they come from B&Q. I have been looking for analogies here and the best I can do is to suggest the impression of a building that is a little like a film set – it looks good from one side but when you get round the back, there's not much there. There are old bits from the 19th century, of course, but there's nothing very special and I understand much of the old material would be salvaged for use in the new building.

> On balance, I am satisfied that demolition of this building is allowable if there are acceptable and detailed plans for redevelopment. On that matter, I believe the answer is simple because the new plans in large measure are externally a copy of the existing building. The new structure would be about half a metre higher to meet modern building regulations. It is only the two storey extension on the footprint of the existing single storey kitchen and bathroom that is materially different. An extension in this manner, as far as I can tell, has never been in contention.
>
> In my view, therefore, the proposed building meets the conditions of Section 7.8 of the English Heritage guidance on conservation area management which says *"when considering proposals* [for] *new development, the local planning authority's principal concern should be the appropriateness of the overall mass or volume of the building, its scale and its relationship to its context. A new building should be in harmony with its neighbours"*.
>
> I believe the designs in front of us meet these conditions in full and that the effect of the new building on the conservation area would, therefore, in my opinion, be minimal.
>
> I believe that the application thus meets all the expectations of PPG 15, of the Conservation Area Statement and of English Heritage. If the new building is painted pink, then, in a very short time, it will be hard to tell that very much has changed.
>
> I will be voting in favour of the application."

32. I did not have witness statements from the other committee members, so it is unclear on the facts whether each of them (like Councillor Gamble) had done background reading of their own of the full text of PPG 15, or whether they had simply relied on the summary of it and limited extracts from it set out in the Report. The Claimant's grounds for judicial review made a complaint that the summary and extracts in the officers' Report were inadequate, so if there were an answer that in fact the committee members had each read PPG 15 for themselves, it would have been appropriate for evidence to that effect to be put before the court. No such evidence was adduced, so I consider the inference to be drawn is that the other councillors had not read the text of PPG 15 for themselves. (I make no criticism of them for this: councillors will usually be entitled to rely upon officers' reports as providing sufficient information for decisions to be taken by them; it simply means that in the present case it is necessary to assess the Claimant's complaint about the adequacy of the officers' Report).

33. There was debate at the meeting and the consensus among the six committee members who voted on the issue (the chairman of the meeting chose to abstain) was that the demolition of the existing cottage and its replacement by a modern version of it would actually enhance the area. In the light of Councillor Gamble's presentation,

the thrust of this reasoning was that, looked at from a distance and in its green setting on the edge of the village, the existing cottage made a positive contribution to the appearance of the conservation area and the replacement cottage would make a similar positive contribution; and if one approached the building more closely, the existing cottage was in a poor and unattractive state and the replacement Copsewood would look better and improve the appearance of the conservation area.

34. Mr Wilmott, the Council officer in attendance at the meeting, sought to capture the sense of the Committee's view in a paragraph of text as follows:

> "The Council has considered the matter afresh and has considered that the existing dwelling at Copsewood makes a positive contribution to the character and appearance of the area, as identified in the Little Cheverell Conservation Area Character Appraisal and Management Proposals. The Council is aware of the presumption in favour of retaining buildings which make such a contribution and of the broad criteria set out in paragraphs 3.16-3.19 of PPG15. However, the prime consideration the Council has had regard to is the statutory duty to pay special attention to the desirability of preserving or enhancing the character or appearance of the Little Cheverell Conservation Area. In this case, the Council has concluded that the design and siting of the replacement dwelling proposed would be an improvement on the existing and would enhance the character and appearance of the area to a greater extent than could be achieved by allowing the existing building to remain. In these circumstances, the Council does not consider that the cost of repairing the existing building should be given overriding weight as it does not consider that the building itself is of such importance and value that it should be retained when set against the merits of the proposed replacement and its positive contribution to the conservation area."

(The last sentence is a little opaque, but in context I think it is tolerably clear that what the committee meant was that the architectural and historic value of the existing building was not so great as to warrant insistence on repair and renovation of the building at significantly greater cost than would be involved in its demolition and replacement by an equivalent modern building: this sort of balancing approach was in line with paragraph 3.19(i) of PPG 15, set out at para. [12] above).

35. This text was put to the councillors, who agreed it. The six councillors who considered the application then voted on it and resolved unanimously that the Consent should be granted.

The grounds of review

(i) The Council failed to have proper regard to PPG 15

36. As the Claimant's argument on this ground was developed, it involved a complaint about the summary of the effect of the relevant paragraphs in PPG 15 contained in the Report prepared by officers for the committee. Mr Harwood also submitted that on no

proper interpretation of PPG 15 could the grant of consent be regarded as compatible with PPG 15. In particular, he said that the approach indicated by Councillor Gamble involved a subjective claim for the architectural merits of the proposed replacement building, which – according to paragraph 3.19(iii) of PPG 15 (para. [12] above) – could not in itself be held to justify the demolition of the existing "Copsewood" cottage.

37. I deal with this latter point first. I do not accept Mr Harwood's submission. In my judgment, Councillor Gamble's approach to the issue, adopted with full knowledge of the terms of PPG 15, was well-considered, well-informed and legitimate. The approach to protection of buildings in conservation areas set out in PPG 15 is a demanding one (see *Fulford v Secretary of State for the Environment*, unrep., 26 March 1997, Stephen Richards sitting as a Deputy Judge of the High Court), and Councillor Gamble properly treated it as such. He recognised that there should be a presumption in favour of retaining the existing building, but on balance he assessed that that presumption was outweighed on the particular facts.

38. I do not consider that Councillor Gamble's preference for the replacement cottage as something which would enhance the conservation area involved a "subjective claim" for its "architectural merits" of the kind to which paragraph 3.19(iii) of PPG 15 refers. That sub-paragraph is directed to the sort of situation where it might be argued that, say, some proposed new skyscraper design by a leading architect is in architectural terms of such superior aesthetic value as to represent an improvement upon an existing listed building which would have to be demolished to allow it to be built. But in the present case there was no proposal to be any significant change in the architectural design of the cottage - it was simply going to be re-built in the same design but (in the opinion of Councillor Gamble and the other committee members) to an enhanced overall standard. Councillor Gamble's approach to the issue was in line with the guidance in paragraph 3.19 of PPG 15 and with the Council's governing duty under section 72 of the Act (rehearsed at paragraph 4.26 of PPG 15). He had proper regard to the condition of the building and the balance of its value against the cost of repairing it (paragraph 3.19(i)), to the adequacy of efforts made to retain the building in use (paragraph 3.19(ii) – in substance in this context, this came down to the same balancing issue as under paragraph 3.19(i), since there was no question of "Copsewood" being a building of a quality which might attract charitable or community ownership of the kind contemplated by paragraph 3.11 of PPG 15) and to the merits of the alternative proposals for the site (paragraph 3.19(iii)). The approach he adopted was not ruled out by anything said in paragraphs 3.16 and 3.17 of PPG 15.

39. As regards the complaint concerning the contents of the Report, Mr Harwood pointed out that it did not set out the full text of paragraphs 3.16, 3.17 and 3.19 of PPG 15 and submitted that for that reason it did not provide proper guidance to the committee members as to the approach they should adopt to the application for conservation area consent. On the evidence before me, it appears that the committee members other than Councillor Gamble had not read the full text of PPG 15. They were dependent on the Report to be informed how, in the light of PPG 15, they should approach the matter.

40. It was common ground that national planning policy guidance is a material consideration to be taken into account when considering an application for conservation area consent. Obviously, if such guidance is to be taken into account properly, it has to be understood with its proper relevant effect.

41. Mr Jones submitted that, in assessing the adequacy of the Report, the appropriate legal standard to be applied is that which is applied when assessing the adequacy of reasons given by a public authority when determining a planning application. He referred me in that regard to the familiar guidance given in *South Buckingham DC v Porter (No. 2)* [2004] UKHL 33; [2004] 1 WLR 1953, at [36] per Lord Brown of Eaton-under-Heywood, as follows:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

42. I do not think this submission is correct. The standard for assessment of reasons given by a decision-maker does not provide an appropriate guide for the standard to be met in a report by a person who is not himself the decision-maker (here, the Council officers) to another person who has responsibility for making the decision (here, the committee members) intended to draw that person's attention to the proper approach to be taken and to material considerations. In the former case, the purpose of the obligation to give reasons is to explain why the decision-maker has reached a particular conclusion on an application with a sufficient degree of particularity so that an informed observer can understand why that conclusion was reached. Accordingly, as Lord Brown points out, the reasons can be quite shortly stated and "… need refer only to the main issues in the dispute, not to every material consideration." In the latter case, the purpose of a report it is to equip the person who has to make the decision in question (who may not have a significant degree of background knowledge of the circumstances in which it has to be made) with sufficient indications of the approach they should adopt and of any material factors which they

should take into account (and, depending on the context, perhaps indicating other factors which they have a discretion whether to take into account or factors which they should not take into account).

43. However, in my judgment, applying the proper test, the Claimant's challenge on this ground is not made out. I accept Mr Jones' other submissions in this regard. He correctly observed that the court should focus on the substance of a report by officers given in the present sort of context, to see whether it has sufficiently drawn councillors' attention to the proper approach required by the law and material considerations, rather than to insist upon an elaborate citation of underlying background materials. Otherwise, there will be a danger that officers will draft reports with excessive defensiveness, lengthening them and over-burdening them with quotation of materials, which may have a tendency to undermine the willingness and ability of busy council members to read and digest them effectively. I also consider that his submissions at para. [15] above about the drafting of paragraph 4.27 of PPG 15 (the significance of the phrase "the *general* presumption" and the phrase "the same *broad* criteria") are correct. On proper interpretation, paragraph 4.27 does not indicate that planning authorities are required to apply exactly the same approach to an application to demolish a building in a conservation area as would be applied to an application to demolish a listed building.

44. The interpretation of paragraph 4.27 which I prefer, in line with Mr Jones' submissions, is supported by the different statutory context in which it provides guidance (sections 69 and 72 of the Act, relating to the protection of conservation areas as areas), as distinct from the statutory provisions for which paragraphs 3.16 to 3.19 of PPG 15 provide guidance (sections 1 and 16 of the Act, relating to the need to protect particular buildings). I do not consider that paragraph 4.27 can properly be read as intending to import exactly the same strict approach to protection of specific buildings as is appropriate in the context of preservation of listed buildings.

45. In my view, the officers' Report in this case provided committee members with appropriate and sufficient guidance regarding the approach they should adopt to consideration of Mr and Mrs Walker's application for conservation area consent. It gave a proper indication of the approach required to be applied by section 72 of the Act. It set out the general presumption in favour of retention of old buildings contained in paragraph 4.27 of PPG 15. Setting out the headings of the sub-paragraphs in paragraph 3.19 of PPG 15 was in my opinion a sufficient indication of the broad criteria which paragraph 4.27 stated should be taken into account. The parts of sub-paragraphs 3.19(i), (ii) and (iii) which were not quoted in the Report were not germane to the particular application and context which the committee had to consider, and the Council officers could fairly and properly decide that it would not be helpful to committee members to set those sub-paragraphs out in full. The same is true of paragraphs 3.16 and 3.17 of PPG 15. As a matter of substance, the committee members were given good direction by the Report and the relevant effect of PPG 15 was not misrepresented.

(ii) The Council failed properly to consider and reach a conclusion whether the proposal complied with PPG 15.

46. It follows from my ruling on Ground (i) above that this ground of challenge also fails. In my view, the committee members did properly and adequately consider the

application of the guidance in PPG 15 to the circumstances of the case before them. They could properly reach the conclusion, as they did, that the grant of the Consent did not involve any departure from the guidance in PPG 15.

(iii) Irrationality

47. Mr Harwood submitted that the decision of the committee was irrational, since by it they failed to protect and preserve any part of the historic fabric of the existing "Copsewood" cottage. He said that it is in the nature of a conservation area that planning authorities should aim to conserve what is there; in this case, that could be achieved by refusing conservation area consent for the proposed demolition of the existing cottage and leaving it to the owners to either sell the property or renovate it; accordingly, it was irrational for the committee to grant the consent.

48. I dismiss this challenge as well. Neither the Act nor PPG 15 suggest that demolition of an old building in a conservation area will always be unacceptable. On the contrary, PPG 15 sets out factors to be taken into account in deciding whether it is acceptable or not. The argument under this Ground is in substance a repetition in different legal clothes of the argument of the Claimant under Ground 1, which I have already rejected. It is not irrational for a local authority to allow for demolition of an old but undistinguished building in a conservation area in circumstances such as those in the present case.

49. In this case, the committee were entitled to conclude that the replacement of the existing building with a modern building of similar appearance and improved finish, occupying the same setting, would enhance the area. There was nothing irrational in their consideration of the matter or in the conclusion they arrived at.

Conclusion

50. For these reasons, I dismiss this claim for judicial review.

A Supreme Court

Regina (Samuel Smith Old Brewery (Tadcaster) and another) *v* North Yorkshire County Council

B **[2020] UKSC 3**

2019 Dec 3;
2020 Feb 5

Lord Carnwath, Lord Hodge, Lord Kitchin, Lord Sales JJSC, Baroness Hale of Richmond

Planning — Development — Green Belt land — Application for extension
C *of magnesium limestone quarry in Green Belt — Planning officer's report concluding that proposed development would not materially harm character and openness of Green Belt — Local planning authority granting application — Whether planning officer erring in approach to "openness" of Green Belt — Whether visual quality of landscape essential part of "openness" for which Green Belt protected — National Planning Policy Framework (2012), para 90*

D The local planning authority granted planning permission for the extension of a mineral extraction quarry situated on Green Belt land. The claimants, who owned land in the vicinity of the quarry, sought judicial review of the grant of planning permission on the ground that the planning officer's report, which had been considered by the local authority's planning committee, was flawed in that the concept of "openness" in paragraph 90 of the National Planning Policy Framework (2012)[1] had been misapplied so that it had erred in concluding that the development in the
E Green Belt was "not inappropriate". The judge dismissed the claim for judicial review but the Court of Appeal allowed the claimants' appeal and quashed the grant of planning permission.

On appeal by the local planning authority—

Held, allowing the appeal, that it was clear from the history and aims of the Green Belt policy that the visual quality of the landscape was not in itself an essential
F part of the "openness" for which the Green Belt was protected; that the concept of "openness" in paragraph 90 of the National Planning Policy Framework was a broad policy concept which referred back to the underlying aim of Green Belt policy of preventing urban sprawl, that openness was the counterpart of urban sprawl and was not necessarily about the visual qualities of the land, nor did it imply freedom from any form of development; that paragraph 90 showed that some forms of development, including mineral extraction, might be compatible with the
G concept of openness, and a quarry could, as a barrier to urban sprawl, be regarded as open in Green Belt terms; that the issue which had to be addressed was whether the proposed mineral extraction would preserve the openness of the Green Belt, or otherwise conflict with the purposes of including the land within the Green Belt; that the officer's report specifically identified and addressed those issues and there was no error of law on the face of the report; that paragraph 90 did not expressly or by implication refer to visual impact as a necessary part of the analysis and the matters
H relevant to openness in any particular case were matters of planning judgement and not law; that the officer had been entitled to take the view in his planning judgement that, in the context of the quarry extension, and taking account of other matters, there was no detraction from openness in Green Belt terms; and that, accordingly, the

[1] National Planning Policy Framework, para 90: see post para 9.

judge's order dismissing the claim for judicial review would be restored (post paras 5, 22, 39–42).

Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening) [2012] PTSR 983, SC(Sc), *Europa Oil and Gas Ltd v Secretary of State for Communities and Local Government* [2014] 1 P & CR 3 and [2014] PTSR 1471, CA, *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 623, SC(E) and *Turner v Secretary of State for Communities and Local Government* [2017] 2 P & CR 1, CA considered.

Decision of the Court of Appeal [2018] EWCA Civ 489 reversed.

The following cases are referred to in the judgment of Lord Carnwath JSC:

Bolton Metropolitan Borough Council v Secretary of State for the Environment [2017] PTSR 1063; (1990) 61 P & CR 343, CA

CREEDNZ Inc v Governor General [1981] 1 NZLR 172

Derbyshire Dales District Council v Secretary of State for Communities and Local Government [2009] EWHC 1729 (Admin); [2010] 1 P & CR 19

Europa Oil and Gas Ltd v Secretary of State for Communities and Local Government [2013] EWHC (Admin) 2643; [2014] 1 P & CR 3; [2014] EWCA Civ 825; [2014] PTSR 1471, CA

Findlay, In re [1985] AC 318; [1984] 3 WLR 1159; [1984] 3 All ER 801, HL(E)

Hopkins Homes Ltd v Secretary of State for Communities and Local Government [2017] UKSC 37; [2017] PTSR 623; [2017] 1 WLR 1865; [2017] 4 All ER 938, SC(E)

R (Heath & Hampstead Society) v Camden London Borough Council [2007] EWHC 977 (Admin); [2007] 2 P & CR 19

R (Heath & Hampstead Society) v Vlachos [2008] EWCA Civ 193; [2008] 3 All ER 80, CA

R (Lee Valley Regional Park Authority) v Epping Forest District Council [2016] EWCA Civ 404; [2016] Env LR 30, CA

Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government [2014] EWCA Civ 1386; [2015] PTSR 274, CA

Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening) [2012] UKSC 13; [2012] PTSR 983, SC(Sc)

Timmins v Gedling Borough Council [2014] EWHC 654 (Admin)

Turner v Secretary of State for Communities and Local Government [2016] EWCA Civ 466; [2017] 2 P & CR 1, CA

The following additional case was cited in argument:

R (Mansell) v Tonbridge and Malling Borough Council [2017] EWCA Civ 1314; [2019] PTSR 1452, CA

APPEAL from the Court of Appeal

On 22 September 2016 the local planning authority, North Yorkshire County Council, granted planning permission to the quarry owner, Darrington Quarries Ltd, to extend the operational face of the Jackdaw Crag Quarry in Tadcaster, a magnesian limestone quarry which lay in Green Belt land. The first claimant, Samuel Smith Old Brewery (Tadcaster), and the second claimant, Oxton Farm, sought judicial review of the decision to grant planning permission, on the ground that the report of the planning officer, which had been considered by the local authority's planning and regulatory functions committee, had misapplied paragraph 90 of the National Planning Policy Framework (2012) ("NPPF"), and that the authority had consequently erred in concluding that the proposed development for mineral extraction was not inappropriate in the Green

A Belt. The quarry owner was made an interested party in the proceedings. On 7 March 2017 Hickinbottom J [2017] EWHC 442 (Admin) dismissed the claimants' application. On 16 March 2018 the Court of Appeal (Lewison and Lindblom LJJ) [2018] EWCA Civ 489 allowed an appeal by the claimants and quashed the planning permission.

Pursuant to permission to appeal granted by the Supreme Court (Baroness Hale of Richmend PSC, Lord Carnwath and Lady Arden JJSC) on
B 5 November 2018, the local planning authority appealed. The issue on the appeal was whether the local authority had misunderstood and/or misapplied paragraph 90 of the NPPF when it concluded that the proposed development was not "inappropriate" in the Green Belt.

The facts are stated in the judgment of Lord Carnwath JSC, post, paras 15–20.

C

Daniel Kolinsky QC and *Hannah Gibbs* (instructed by *Solicitor, North Yorkshire County Council, Northallerton*) for the local planning authority.

Alison Ogley (instructed by *Walker Morris llp, Leeds*) for the quarry owner.

Peter Village QC, *James Strachan QC*, *Ned Helme* and *Ruth Keating*
D (instructed by *Pinsent Mason llp, Leeds*) for the claimants.

LORD CARNWATH JSC (with whom **LORD HODGE, LORD KITCHIN** and **LORD SALES JJSC** and **BARONESS HALE OF RICHMOND** agreed) handed down the following judgment.

Introduction
E

1 The short point in this appeal is whether the appellant county council, as local planning authority, correctly understood the meaning of the word "openness" in the national planning policies applying to mineral working in the Green Belt, as expressed in the National Planning Policy Framework (2012) ("NPPF"). The Court of Appeal [2018] EWCA Civ 489, disagreeing
F with Hickinbottom J [2017] EWHC 442 (Admin) in the High Court, held that, in granting planning permission for the extension of a quarry, the council had been misled by defective advice given by their planning officer. In the words of Lindblom LJ, giving the leading judgment:

> "It was defective, at least, in failing to make clear to the members
G that, under government planning policy for mineral extraction in the Green Belt in paragraph 90 of the NPPF, visual impact was a potentially relevant and potentially significant factor in their approach to the effect of the development on the 'openness of the Green Belt' …" (para 49, per Lindblom LJ).

He thought that, having regard to the officer's own assessment, it was "quite
H obviously relevant", and therefore a necessary part of the assessment. The court quashed the permission.

2 In this court, the council, supported by the quarry operator (the third respondent), argues that the Court of Appeal's reasoning was based on misunderstandings both of the relevant policies and of the officer's report, and that the permission should be reinstated. The first and second

respondents (collectively referred to as "Samuel Smith") seek to uphold the decision and reasoning of the Court of Appeal.

Green Belt policy

History and aims

3 Although we are directly concerned with the policies in the NPPF (in its original 2012 version), Green Belt policies have a very long history. It can be traced back to the first national guidance on Green Belts in Circular 42/55 (issued in August 1955). More recently Planning Policy Guidance 2: Green Belts (published in 1995 and amended in 2001) ("PPG2") confirmed the role of Green Belts as "an essential element of planning policy for some four decades"; and noted that the purposes of Green Belt policies and the related development control policies set out in 1955 "remain valid today with remarkably little alteration" (paragraph 1.1). The NPPF itself, as appears from ministerial statements at the time, was designed to consolidate and simplify policy as expressed in a number of ministerial statements and guidance notes, rather than to effect major policy changes (see *Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government* [2015] PTSR 274, paras 16 et seq, 22, per Sullivan LJ).

4 In the NPPF the concept of "openness" first appears in the introduction to section 9 ("Protecting Green Belt land") which gives a statement of the fundamental aim and the purposes of Green Belt policy:

> "79. The Government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence.
>
> "80. Green Belt serves five purposes:
>
> • to check the unrestricted sprawl of large built-up areas;
> • to prevent neighbouring towns merging into one another;
> • to assist in safeguarding the countryside from encroachment;
> • to preserve the setting and special character of historic towns; and
> • to assist in urban regeneration, by encouraging the recycling of derelict and other urban land."

5 This statement of the "fundamental aim" of the policy and the "five purposes" is unchanged from PPG2. The Planning Policy Guidance included a fuller statement of certain "objectives" for the use of land within defined Green Belts, including (for example) providing opportunities for access to open countryside, and retaining and enhancing attractive landscapes (paragraph 1.6), but adding:

> "The extent to which the use of land fulfils these objectives is however not itself a material factor in the inclusion of land within a Green Belt, or in its continued protection. For example, although Green Belts often contain areas of attractive landscape, the quality of the landscape is not relevant to the inclusion of land within a Green Belt or to its continued protection. The purposes of including land in Green Belts are of paramount importance to their continued protection, and should take precedence over the land use objectives": paragraph 1.7.

A It is clear therefore that the visual quality of the landscape is not in itself an essential part of the "openness" for which the Green Belt is protected.

Control of development in Green Belts

6 Key features of development control in Green Belts are the concepts of "appropriate" and "inappropriate" development, and the need in the B latter case to show "very special circumstances" to justify the grant of planning permission. In *R (Lee Valley Regional Park Authority) v Epping Forest District Council* [2016] Env LR 30 ("the *Lee Valley* case"), Lindblom LJ explained their relationship:

> "18. A fundamental principle in national policy for the Green C Belt, unchanged from PPG2 to the NPPF, is that the construction of new buildings in the Green Belt is 'inappropriate' development and should not be approved except in 'very special circumstances', unless the proposal is within one of the specified categories of exception in the 'closed lists' in paragraphs 89 and 90 … The distinction between development that is 'inappropriate' in the Green Belt and development that is not 'inappropriate' (ie appropriate) governs the D approach a decision-maker must take in determining an application for planning permission. 'Inappropriate development' in the Green Belt is development 'by definition, harmful' to the Green Belt—harmful because it is there—whereas development in the excepted categories in paragraphs 89 and 90 of the NPPF is not."

E **7** These concepts are expressly preserved in the policies for the control of development set out in paragraphs 87 et seq of the NPPF:

> "87. As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
>
> "88. … 'Very special circumstances' will not exist unless the potential F harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations."

8 Paragraph 89 indicates that construction of new buildings is to be regarded as "inappropriate" with certain defined exceptions. The exceptions include, for example, "buildings for agriculture and forestry", and (relevant to authorities discussed later in this judgment):

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> "• provision of appropriate facilities for outdoor sport, outdoor recreation and for cemeteries, as long as it preserves the openness of the Green Belt and does not conflict with the purposes of including land within it …"
>
> "• limited infilling or the partial or complete redevelopment of previously developed sites (brownfield land), whether redundant or in H continuing use (excluding temporary buildings), which would not have a greater impact on the openness of the Green Belt and the purpose of including land within it than the existing development."

9 Paragraph 90, which defines forms of development regarded as "not inappropriate" is directly in issue in the present case:

"Certain other forms of development are also not inappropriate in Green Belt *provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in Green Belt*. These are:

- mineral extraction;
- engineering operations;
- local transport infrastructure which can demonstrate a requirement for a Green Belt location;
- the re-use of buildings provided that the buildings are of permanent and substantial construction; and
- development brought forward under a Community Right to Build Order." (Emphasis added. I shall refer to the words so emphasised as "the openness proviso".)

10 Paragraphs 89–90 replace a rather fuller statement of policy for "Control of Development" in section 3 of PPG2. Paragraphs 3.4–3.6 ("New buildings"), and paragraphs 3.7–3.12 ("Re-use of buildings", and, under a separate heading, "Mining operations, and other development") cover substantially the same ground, respectively, as NPPF paragraphs 89 and 90, but in rather fuller terms. The policy for "Mining operations, and other development" was as follows:

"3.11 Minerals can be worked only where they are found. Their extraction is a temporary activity. Mineral extraction *need not be inappropriate development: it need not conflict with the purposes of including land in Green Belts, provided that high environmental standards are maintained and that the site is well restored*. Mineral and local planning authorities should include appropriate policies in their development plans. Mineral planning authorities should ensure that planning conditions for mineral working sites within Green Belts achieve suitable environmental standards and restoration …

"3.12 The statutory definition of development includes engineering and other operations, and the making of any material change in the use of land. The carrying out of such operations and the making of material changes in the use of land are inappropriate development *unless they maintain openness and do not conflict with the purposes of including land in the Green Belt*." (Emphasis added.)

11 It will be noted that a possible textual issue arises from the way in which the PPG2 policies have been shortened and recast in the NPPF. In the Planning Policy Guidance the openness proviso is in terms directed to forms of development other than mineral extraction (it also appears in the section on re-use of buildings: paragraph 3.8). By contrast, mineral extraction is not expressly subject to the proviso, but may be regarded as not inappropriate, subject only to "high environmental standards" and the quality of restoration. In the shortened version in the NPPF these categories of potentially appropriate development have been recast in paragraph 90, and brought together under the same proviso, including the requirement to preserve openness.

12 I do not read this as intended to mark a significant change of approach. If that had been intended, one would have expected it to have been signalled more clearly. To my mind the change is explicable as no more than a convenient means of shortening and simplifying the policies without material

change. It may also have been thought that, whereas mineral extraction in itself would not normally conflict with the openness proviso, associated building or other development might raise greater problems. A possible example may be seen in *Europa Oil and Gas Ltd v Secretary of State for Communities and Local Government* [2014] 1 P & CR 3; [2014] PTSR 1471 discussed below (para 26).

Other relevant policies

13 *Mineral policies* A later part of the NPPF (section 13, headed "Facilitating the sustainable use of minerals") deals with mineral development generally. It emphasises the importance of ensuring a sufficient supply of minerals to support economic growth (paragraph 142); and gives advice on the inclusion of mineral policies in local plans (paragraph 143), and on the determination of planning applications (paragraph 144). The latter includes (inter alia) a requirement to ensure that there are "no unacceptable adverse impacts on the natural and historic environment" and that provision is made for "restoration and aftercare at the earliest opportunity to be carried out to high environmental standards". No issue arises under these policies in the present case, but they show that development which is "appropriate" in Green Belt may be found unacceptable by reference to other policy constraints.

14 *Local plan policies* The proposal was also subject to Green Belt and other policies in the local plan (the Selby District Core Strategy Local Plan). These are summarised by Lindblom LJ (para 9). It is not suggested by either party that these materially affect the legal issues arising in the present appeal.

The application and the officer's report

15 The application was for an extension to the operational face of Jackdaw Crag Quarry, a magnesian limestone quarry owned and operated by the third respondent, Darrington Quarries Ltd. The quarry, which extends to about 25 hectares, is in the Green Belt, about 1·5 kilometres to the south-west of Tadcaster. It has been operated by Darrington Quarries for many years, planning permission for the extraction of limestone having first been granted in July 1948 and subsequently renewed. The proposed extension is for an area of about six hectares, expected to yield some two million tonnes of crushed rock over a period of seven years.

16 The application had received planning permission in January 2013, but that permission was quashed because of failings in the environmental impact assessment. The application came back to the county council's Planning and Regulatory Functions Committee on 9 February 2016, when the committee accepted their officer's recommendation that planning permission be granted. Following completion of a section 106 of the Town and Country Planning Act 1990 agreement planning permission was granted on 22 September 2016.

17 The officer's report, prepared by Vicky Perkin for the Corporate Director, Business and Environmental Services, was an impressively comprehensive and detailed document, running to more than 100 pages, and dealing with a wide range of planning considerations. Under the heading "Landscape impact", the report summarised the views of the council's

Principal Landscape Architect, who had not objected in principle to the proposal, but had drawn attention to the potential landscape impacts and the consequent need to ensure that mitigation measures are maximised (paras 4.118 and 7.42–5).

18 For present purposes the critical part of the report comes under the heading "Impacts of the Green Belt" (para 7.117 et seq). Having summarised the relevant national and local policies, she referred (para 7.120) to the consultation response from Samuel Smith stating:

> "the application site falling within the Green Belt is critical in the determination of the proposal and added that '*mineral extraction remains inappropriate development in the Green Belt unless it can be demonstrated that the proposal both preserves the openness of the Green Belt and doesn't conflict with the purposes of including land within the Green Belt*'. The objector also stated that one of the aims of the Green Belt, in '*assisting in urban regeneration will be materially harmed by the development*'…" (Emphasis added.)

19 The officer commented:

> "7.121 When considering applications within the Green Belt, in accordance with the NPPF, it is necessary to consider whether the proposed development will firstly preserve the openness of the Green Belt and secondly ensure that it does not conflict with the purposes of including land within the Green Belt.
>
> "7.122 It is considered that the proposed development preserves the openness of the Green Belt and does not conflict with the purposes of including land within the Green Belt. Openness is not defined, but it is commonly taken to be the absence of built development. Although the proposed development would be on existing agricultural land, it is considered that because the application site immediately abuts the existing operational quarry, it would not introduce development into this area of a scale considered to conflict with the aims of preserving the openness of the Green Belt.
>
> "7.123 In terms of whether the proposed development does not conflict with the purposes of including land within the Green Belt, the proposed quarrying operations are not considered to conflict with the purposes of including land within the Green Belt. Equally, it is not considered that the proposed development would undermine the objective of safeguarding the countryside from encroachment as it should be considered that the site is in conjunction with an operational quarry which will be restored. The proposed development is a temporary use of land and would also be restored upon completion of the mining operations through an agreed [restoration plan].
>
> "7.124 The purposes of including land within the Green Belt to prevent the merging of neighbouring towns and impacts upon historic towns are not relevant to this site as it is considered the site is adequately detached from the settlements of Stutton, Towton and Tadcaster. It is also important to note that the A64 road to the north severs the application site from Tadcaster.
>
> "7.125 As mentioned in the response from [Samuel Smith], one of the purposes of the Green Belt is assisting in urban regeneration which the

A objector claims will be undermined by the proposed development. Given the situation of the application site, adjacent to an existing operational quarry and its rural nature, and the fact that minerals can only be worked where they are found, it is considered that the site would not, therefore, undermine this aim of the Green Belt.

"7.126 The restoration scheme is to be designed and submitted as part of a section 106 Agreement, it is considered that there are B appropriate controls to ensure adequate restoration of the site. Due to the proposed restoration of the temporary quarry and the fact that it is considered the proposal doesn't conflict with the aims of the Green Belt, it is considered that the proposed development would not materially harm the character and openness of the Green Belt, and would, therefore, comply with Policy SP3 and SP13 of the Selby District C Core Strategy Local Plan and NPPF."

20 Section 8 of the report gives the planning officer's conclusion:

"8.4 It is considered that the proposed screening could protect the environment and residential receptors from potential landscape and D visual impacts.

"8.5 Due to the proposed restoration of the temporary quarry and the fact that it is considered the proposal doesn't conflict with the aims of the Green Belt, it is considered that the proposed development would not materially harm the character and openness of the Green Belt."

E *Legal principles*

21 Much time was taken up in the judgments below, as in the submissions in this court, on discussion of previous court authorities on the relevance of visual impact under Green Belt policy. The respective roles of the planning authorities and the courts have been fully explored in two recent cases in this court: *Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening)* F [2012] PTSR 983 and *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 623. In the former Lord Reed JSC, while affirming that interpretation of a development plan, as of any other legal document, is ultimately a matter for the court, also made clear the limitations of this process:

G "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 H 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 …" (para 19).

In the *Hopkins Homes* case (paras 23–34) I warned against the danger of "over-legalisation" of the planning process. I noted the relatively specific

language of the policy under consideration in the *Tesco* case, contrasting that with policies: "expressed in much broader terms [which] may not require, nor lend themselves to, the same level of legal analysis." A

22 The concept of "openness" in paragraph 90 of the NPPF seems to me a good example of such a broad policy concept. It is naturally read as referring back to the underlying aim of Green Belt policy, stated at the beginning of this section: "to prevent urban sprawl by keeping land permanently open …" Openness is the counterpart of urban sprawl and is also linked to the purposes to be served by the Green Belt. As PPG2 made clear, it is not necessarily a statement about the visual qualities of the land, though in some cases this may be an aspect of the planning judgement involved in applying this broad policy concept. Nor does it imply freedom from any form of development. Paragraph 90 shows that some forms of development, including mineral extraction, may in principle be appropriate, and compatible with the concept of openness. A large quarry may not be visually attractive while it lasts, but the minerals can only be extracted where they are found, and the impact is temporary and subject to restoration. Further, as a barrier to urban sprawl a quarry may be regarded in Green Belt policy terms as no less effective than a stretch of agricultural land. B C

23 It seems surprising in retrospect that the relationship between openness and visual impact has sparked such legal controversy. Most of the authorities to which we were referred were concerned with the scope of the exceptions for buildings in paragraph 89 (or its predecessor). In that context it was held, unremarkably, that a building which was otherwise inappropriate in Green Belt terms was not made appropriate by its limited visual impact (see *R (Heath & Hampstead Society) v Camden London Borough Council* [2007] 2 P & CR 19, upheld at *R (Heath & Hampstead Society) v Vlachos* [2008] 3 All ER 80). As Sullivan J said in the High Court: D E

> "The loss of openness (ie unbuilt on land) within the Green Belt or Metropolitan Open Land is of itself harmful to the underlying policy objective. If the replacement dwelling is more visually intrusive there will be further harm in addition to the harm by reason of inappropriateness …" (para 22). F

To similar effect, in the *Lee Valley* case [2016] Env LR 30, Lindblom LJ said: "The concept of 'openness' here means the state of being free from built development, the absence of buildings—as distinct from the absence of visual impact …" (para 7, cited by him in his present judgment at para 19).

24 Unfortunately, in *Timmins v Gedling Borough Council* [2014] EWHC 654 (Admin) (a case about another familiar Green Belt category—cemeteries and associated buildings), Green J went a stage further holding, not only that there was "a clear conceptual distinction between openness and visual impact", but that it was: "wrong *in principle* to arrive at a specific conclusion as to openness by reference to visual impact" (para 78, emphasis in original). G

25 This was disapproved (rightly in my view) in *Turner v Secretary of State for Communities and Local Government* [2017] 2 P & CR 1, para 18. This concerned an inspector's decision refusing permission for a proposal to replace a mobile home and storage yard with a residential bungalow in the Green Belt. In rejecting the contention that it was within the exception for redevelopment which "would not have a greater impact on the openness of the Green Belt", the inspector had expressly taken account of its visual H

effect, and that it would "appear as a dominant feature that would have a harmful impact on openness here". The Court of Appeal upheld the decision. Sales LJ said:

> "The concept of 'openness of the Green Belt' is not narrowly limited to the volumetric approach suggested by [counsel]. The word 'openness' is open-textured and a number of factors are capable of being relevant when it comes to applying it to the particular facts of a specific case. Prominent among these will be factors relevant to how built up the Green Belt is now and how built up it would be if redevelopment occurs … and factors relevant to the visual impact on the aspect of openness which the Green Belt presents." (Para 14.)

Before us there was no challenge to the correctness of this statement of approach. However, it tells one nothing about how visual effects may or may not be taken into account in other circumstances. That is a matter not of legal principle, but of planning judgement for the planning authority or the inspector.

26 The only case referred to in argument which was directly concerned with mineral extraction as such was *Europa Oil and Gas Ltd v Secretary of State for Communities and Local Government* [2014] 1 P & CR 3 (upheld at [2014] PTSR 1471). That concerned an application for permission for an exploratory drill site to explore for hydrocarbons in the Green Belt, including plant and buildings. The inspector had considered the potential effect of the development on the Green Belt:

> "… I consider Green Belt openness in terms of the absence of development. The proposal would require the creation of an extensive compound, with boundary fencing, the installation of a drilling rig of up to 35 metres in heating, a flare pit and related buildings, plant, equipment and vehicle parking on the site. Taking this into account, together with the related HGV and other traffic movements, I consider that the Green Belt openness would be materially diminished for the duration of the development and that there would be a conflict with Green Belt purposes in respect of encroachment into the countryside over that period." (Quoted by Ouseley J at para 16.)

He refused permission, taking the view that it did not fall within the exception for "mineral extraction", and that there were no very special circumstances to outweigh the harm to the Green Belt identified in that passage.

27 It was held that he had erred in failing to treat the proposal as one for mineral extraction, and therefore potentially within the exception in NPPF paragraph 90. Ouseley J noted the special status of mineral extraction under Green Belt policy. As he said:

> "67. One factor which affects appropriateness, the preservation of openness and conflict with Green Belt purposes, is the duration of development and the reversibility of its effects. Those are of particular importance to the thinking which makes mineral extraction potentially appropriate in the Green Belt. Another is the fact that extraction, including exploration, can only take place where those operations

achieve what is required in relation to the minerals. Minerals can only be extracted where they are found …

"68. Green Belt is not harmed by such a development because the fact that the use has to take place there, and its duration and reversibility are relevant to its appropriateness and to the effect on the Green Belt."

28 However, he made clear that it remained necessary for the decision-maker to consider the proposal under the proviso to paragraph 90. Affirming his decision in the Court of Appeal, Richards LJ said (para 41):

"The key point, in my judgment, is that the inspector approached the effect on Green Belt openness and purposes on the premise that exploration for hydrocarbons was necessarily inappropriate development since it did not come within any of the exceptions. He was not considering the application of the proviso to paragraph 90 at all: on his analysis, he did not get that far. Had he been assessing the effect on Green Belt openness and purposes from the point of view of the proviso, it would have been on the very different premise that exploration for hydrocarbons on a sufficient scale to require planning permission is nevertheless capable in principle of being appropriate development. His mind-set would have been different, or at least it might well have been different."

Although the decision turned principally on a legal issue as to the meaning of "mineral extraction", it is significant that the impact on the Green Belt identified by the inspector (including a 35 metre drill rig and related buildings) was not thought necessarily sufficient in itself to lead to conflict with the openness proviso. That was a matter for separate planning judgement.

Material considerations

29 Section 70(2) of the Town and Country Planning Act 1990 ("the Act") required the council in determining the application to have regard to the development plan and "any other material consideration". In summary Samuel Smith's argument, upheld by the Court of Appeal, is that the authority erred in failing to treat the visual effects, described by the officer in her assessment of "Landscape impact" (para 17 above) as "material considerations" in its application of the openness proviso under paragraph 90.

30 The approach of the court in response to such an allegation has been discussed in a number of authorities. I sought to summarise the principles in *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2010] 1 P & CR 19. The issue in that case was whether the authority had been obliged to treat the possibility of alternative sites as a material consideration. I said:

"17. It is one thing to say that consideration of a possible alternative site is a potentially relevant issue, so that a decision-maker does not err in law if he has regard to it. It is quite another to say that it is *necessarily* relevant, so that he errs in law if he fails to have regard to it.

"18. For the former category the underlying principles are obvious. It is trite and long-established law that the range of potentially relevant

A planning issues is very wide (*Stringer v Minister of Housing and Local Government* [1970] 1 WLR 1281); and that, absent irrationality or illegality, the weight to be given to such issues in any case is a matter for the decision-maker (*Tesco Stores Ltd v Secretary of State for the Environment and West Oxfordshire District Council* [1995] 1 WLR 759, 780). On the other hand, to hold that a decision-maker has erred in law by *failing* to have regard to alternative sites, it is necessary to find some legal principle which compelled him (not merely empowered) him to do so."

B

31 I referred to the discussion of this issue in a different context by Cooke J in the New Zealand Court of Appeal, in *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172, 182 (adopted by Lord Scarman in the House of C Lords in *In re Findlay* [1985] AC 318, 333–334, and in the planning context by Glidewell LJ in *Bolton Metropolitan Borough Council v Secretary of State for the Environment and Greater Manchester Waste Disposal Authority* [2017] PTST 1063, 1071):

"26. [Cooke J] took as a starting point the words of Lord D Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, 228: 'If, in the statute conferring the discretion there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters.' He continued: 'What has to be emphasised is that it is only when the statute *expressly or impliedly identifies considerations required to be taken into* E *account by the authority as a matter of legal obligation* that the court holds a decision invalid on the ground now invoked. It is not enough that it is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision …' (emphasis added).

"27. In approving this passage, Lord Scarman noted that [Cooke J] F had also recognised, that: '… in certain circumstances there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the ministers … would not be in accordance with the intention of the Act.' (*In re Findlay* at p 334.)

"28. It seems, therefore, that it is not enough that, in the judge's view, consideration of a particular matter might realistically have made G a difference. Short of irrationality, the question is one of statutory construction. It is necessary to show that the matter was one which the statute expressly or impliedly (because 'obviously material') requires to be taken into account 'as a matter of legal obligation'."

32 Mutatis mutandis, similar considerations apply in the present case. H The question therefore is whether under the openness proviso visual impacts, as identified by the inspector, were expressly or impliedly identified in the Act or the policy as considerations required to be taken into account by the authority "as a matter of legal obligation", or alternatively whether, on the facts of the case, they were "so obviously material" as to require direct consideration.

The reasoning of the courts below

33 Hickinbottom J in the High Court held in summary that consideration of visual impact was neither an implicit requirement of the openness proviso, nor obviously relevant on the facts of this case. He said:

> "64. I stress that we are here concerned with differential impact, ie the potential adverse visual impact over and above the adverse spatial impact. On the facts of this case … it is difficult to see what the potential visual impact of the development would be over and above the spatial impact, which, as Mr Village concedes, was taken into account. In any event, even if there were some such impact, that does not mean that openness would be adversely affected; because, in assessing openness, the officers would still have been entitled to take into account factors such as the purpose of the development, its duration and reversibility, and would have been entitled to conclude that, despite the adverse spatial and visual impact, the development would nevertheless not harm but preserve the openness of the Green Belt.
>
> "65. In this case, the potential visual impact of the development falls very far short of being an obvious material factor in respect of this issue. In my judgment, in the circumstances of this case, the report did not err in not taking into consideration any potential visual impact from the development. Indeed, on the facts of this case, I understand why the officers would have come to the view that consideration of visual impact would not have materially added to the overarching consideration of whether the development would adversely impact the openness of the Green Belt."

34 Lindblom LJ took the opposite view. He summarised the visual impacts described by the officer:

> "42. The proposed development was a substantial extension to a large existing quarry, with a lengthy period of working and restoration. As the Principal Landscape Architect recognised in her response to consultation, and the officer acknowledged without dissent in her report, there would be permanent change to the character of the landscape (paras 4.109 and 4.115 of the report). The 'quality of the Locally Important Landscape Area as a whole would be compromised' (para 7.41). *The exposed face of the extended quarry would be as visible as that of the existing quarry, if not more so* (paras 4.111 and 7.42). *Long distance views could be cut off by the proposed bunding and planting.* Agricultural land would ultimately be replaced by a 'deep lower level landscape' of grassland (para 4.113). The 'character and quality' of the landscape would be 'permanently changed' and the 'impact cannot be described as neutral' (paras 4.115 and 7.44). Concluding her assessment of 'Landscape Impact', the officer was satisfied that the 'proposed screening could protect the environment and residential receptors from potential landscape and visual impacts', and that with the proposed mitigation measures the development would comply with national and local policy (paras 7.47 and 8.4).
>
> "43. That assessment did not deal with the likely effects of the development on the openness of the Green Belt as such, either spatial or visual. *It does show, however, that there would likely be—or at least*

could be—effects on openness in both respects, including the closing-off of long distance views by the bunding and planting that would screen the working (para 4.111 of the officer's report). The officer's conclusion overall (in para 7.47) was, in effect, that the proposed screening would be effective mitigation, without which the development would not be acceptable. But this was not followed with any discussion of the harmful effects that the screening measures themselves might have on the openness of the Green Belt." (Emphasis added.)

35 He then directed particular attention to para 7.122 of the report, which he understood to encapsulate her views on the application of the openness proviso under NPPF paragraph 90:

"45. So it is to para 7.122 that one must look, at least in the first place, to see whether the officer considered the relevance of visual impact to the effect of this development on the openness of the Green Belt. Did she confront this question, and bring the committee's attention to it? I do not think she did. *She neither considered, in substance, the likely visual impact of the development on the openness of the Green Belt nor, it seems, did she ask herself whether this was a case in which an assessment of visual impact was, or might be, relevant to the question of whether the openness of the Green Belt would be preserved*. Indeed, *her observation that openness is 'commonly taken to be the absence of built development' seems deliberately to draw the assessment away from visual impact, and narrow it down to a consideration of spatial impact alone*. And the burden of the assessment, as I read it, is that because the further extraction of limestone would take place next to the existing quarry, the 'scale' of the development would not fail to preserve the openness of the Green Belt. This seems a somewhat surprising conclusion. But what matters here is that it is a consideration only of spatial impact. Of the visual impact of the quarry extension on the openness of the Green Belt, nothing is said at all. *That was, it seems to me, a significant omission, which betrays a misunderstanding of the policy in paragraph 90 of the NPPF.*

"46. One must not divorce para 7.122 from its context. The report must be read fairly as a whole. The question arises, therefore: did the officer address the visual impact of the development on the openness of the Green Belt in the remaining paragraphs of this part of her report, or elsewhere? I do not think she did. *Her consideration of the effects of the development on the 'purposes of including land in the Green Belt', in paras 7.123 to 7.125, is unexceptionable in itself. However, she did not, in these three paragraphs, revisit the question of harm to the openness of the Green Belt, either in spatial or in visual terms*. The conclusion to this part of the report, in para 7.126, is that the 'character and openness of the Green Belt' would not be materially harmed by the development—a conclusion repeated in para 8.5—and that the proposal would therefore comply with Policy SP3 and Policy SP13 of the local plan and the NPPF. But I cannot accept that this conclusion overcomes the lack of consideration of visual impacts on 'openness' in the preceding paragraphs. It seems to treat 'character' as a concept distinct from 'openness'. Even if these two concepts can be seen as related to each other, and however wide the concept of 'character' may be, there is no

suggestion here that the officer was now providing a conclusion different from that in para 7.122, or additional to it.

"47. The same may also be said of the officer's earlier discussion of 'Landscape Impact' in paras 7.41 to 7.47. Her assessment and conclusions in that part of her report are not imported into para 7.122, or cross-referred to as lending support to her conclusion there." (Emphasis added.)

36 This led to the overall conclusion in para 49 (quoted in part at the beginning of this judgment):

"I can only conclude, therefore, that the advice given to the committee by the officer was defective. It was defective, at least, *in failing to make clear to the members that, under government planning policy for mineral extraction in the Green Belt in paragraph 90 of the NPPF, visual impact was a potentially relevant and potentially significant factor* in their approach to the effect of the development on the 'openness of the Green Belt', and hence to the important question of whether the proposal before them was for 'inappropriate' development in the Green Belt—and, indeed, in implying that the opposite was so … One can go further. *On the officer's own assessment of the likely effects of the development on the landscape, visual impact was quite obviously relevant to its effect on the openness of the Green Belt. So the consideration of this question could not reasonably be confined to spatial impact alone.*" (Emphasis added.)

37 Although it is necessary to read the discussion in full, I have highlighted what seem to me the critical points in Lindblom LJ's assessment of the failure to take account of visual effects; in summary: (i) In paras 42 and 43, he extracts from the officer's own landscape assessment the observation that "the exposed face of the extended quarry would be as visible as that of the existing quarry, if not more so" and that "long distance views could be cut off by the proposed bunding and planting". This leads to the view that "there would likely be—or at least could be—effects on openness in both respects, including the closing-off of long distance views by the bunding and planting that would screen the working". (ii) In para 7.122, where the officer purported to address the issue of openness, she failed to consider the likely effect of such visual impact nor its relevance to whether the openness of the Green Belt would be preserved. Instead, by in effect equating openness with absence of built development, she tended to narrow the issue down to a consideration of spatial impact alone. That betrayed a misunderstanding of the policy in paragraph 90 of the NPPF. (iii) The subsequent paragraphs dealt with other aspects of the effect on the purposes of the Green Belt, and were unexceptionable in themselves; but they did not revisit the question of visual impact or so make up for the deficiency in para 7.122. (iv) The officer's advice was defective in this respect. Further on her own assessment visual effect was "quite obviously relevant" to the issue of openness, and the committee could not reasonably have thought otherwise.

38 I hope I will be forgiven for not referring in detail to the arguments of counsel before this court, which substantially reflected the reasoning respectively of the High Court and the Court of Appeal. I note that Mr Peter Village QC for Samuel Smith made a further criticism of para 7.122, not

A adopted by Lindblom LJ, that the officer treated the fact that the site abutted the existing quarry as reducing its impact on openness.

Discussion

39 With respect to Lindblom LJ's great experience in this field, I am unable to accept his analysis. The issue which had to be addressed was whether
B the proposed mineral extraction would preserve the openness of the Green Belt or otherwise conflict with the purposes of including the land within the Green Belt. Those issues were specifically identified and addressed in the report. There was no error of law on the face of the report. Paragraph 90 does not expressly refer to visual impact as a necessary part of the analysis, nor in my view is it made so by implication. As explained in my discussion
C of the authorities, the matters relevant to openness in any particular case are a matter of planning judgement, not law.

40 Lindblom LJ criticised the officer's comment that openness is "commonly" equated with "absence of built development". I find that a little surprising, since it was very similar to Lindblom LJ's own observation in the *Lee Valley* case (para 23 above). It is also consistent with the contrast drawn by the NPPF between openness and "urban sprawl", and with the distinction
D between buildings, on the one hand, which are "inappropriate" subject only to certain closely defined exceptions, and other categories of development which are potentially appropriate. I do not read the officer as saying that visual impact can never be relevant to openness.

41 As to the particular impacts picked out by Lindblom LJ, the officer was entitled to take the view that, in the context of a quarry extension
E of six hectares, and taking account of other matters, including the spatial separation noted by her in para 7.124, they did not in themselves detract from openness in Green Belt terms. The whole of paras 7.121 to 7.126 of the officer's report address the openness proviso and should be read together. Some visual effects were given weight, in that the officer referred to the restoration of the site which would be required. Beyond this, I respectfully agree with Hickinbottom J that such relatively limited visual impact which
F the development would have fell far short of being so obviously material a factor that failure to address it expressly was an error of law. For similar reasons, with respect to Mr Village's additional complaint, I see no error in the weight given by the officer to the fact that this was an extension of an existing quarry. That again was a matter of planning judgement not law.

G *Conclusion*

42 For these reasons, I would allow the appeal and confirm the order of the High Court dismissing the application.

Appeal allowed.
Order of Hickinbottom J restored.

H

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Sol's Ref:
Purchase Order No:

Our Ref: **153998**

Date: **04/08/2021**

Fews Lane: Demolition and erection of 2 dwellinghouses (20/02453/S73), The Retreat JR

Date	Description	Amount	Vat%	Vat
02/07/2021	Review of papers and drafting of PAP Response	£2,150.00	20.0%	£430.00
24/07/2021	First draft of Summary Grounds 22 - 24 July.	£2,100.00	20.0%	£420.00
26/07/2021	Review of emails considering attachments to Summary Grounds. 3 x emails to SR.	£450.00	20.0%	£90.00
28/07/2021	Final review of Summary Grounds with tweaks.	£550.00	20.0%	£110.00
03/08/2021	Final review of Summary Grounds. Telephone conference with instructing solicitor on final tweaks and exhibits.	£450.00	20.0%	£90.00

VAT SUMMARY		
20.0% (FEE) Amount: £5,700.00, VAT: £1,140.00	**Total Fees**	**£5,700.00**
	Total VAT	**£1,140.00**
	Total Due	**£6,840.00**

FOR EACH ITEM OF WORK, PAYMENT IS TO BE MADE WITHIN 30 DAYS OF THE INITIAL FEE NOTE. STATUTORY INTEREST MAY BE CHARGED ON LATE PAYMENT.

ANY CHEQUES SHOULD BE MADE PAYABLE TO Mr Asitha Ranatunga

ANY PAYMENTS BEING MADE BY BACS SHOULD BE MADE INTO CORNERSTONE BARRISTERS BACS ACCOUNT; Sort Code 60-80-08 ACC 60547413

PLEASE QUOTE OUR REFERENCE NO. ON ALL CORRESPONDENCE

Previously rendered on 07/07/2021, 07/07/2021, 28/07/2021, 28/07/2021, 04/08/2021, 04/08/2021 Printed on 04/08/2021

CO/2372/2021

Time of Stephen Reid

Solicitor acting for the Defendant

80 emails	£1,200.00
Perusing documents etc	£ 750.00
Drafting	£ 150.00
Telephone	£ 300.00
Preparation	£ 150.00
Total	£2,550.00

Based on £150.00 per hour

Detailed schedule to follow (once IT issues resolved)

TW timesheet

S73 Fews Lane Time	Date	Task
	9 July 21	Review of summary grounds for Counsel
	9 July 21	Research and evidence gathering for SR re reps of 21 April, email to Stantec, email from Stantec
	9 July 21	Stantec report provision for SR
	9 July 21	Extracts of Stantec report for SR
	9 July 21	Telephone call SR re summary grounds
15mins	6/7 July 21	Further email with SR re further correspondence with FLC 6 July 21 re mistakes plus telephone call
15mins	6 July 21	E-mail with SR re FLC email of 6 July 21
15mins	5 July 21	E-mail to SR further review of PAP response.
30mins	5 July 21	Review of PAP response for SR
15mins	2 July 21	Email Counsel
15mins	2 July 21	Email SR re visibility splays
90mins	1 July 21	Email and review for Counsel re FLC two further grounds of JR challenge, suggested text, including detailed, review of appeal, history search, review of S73 report

20mins	1 July 21	Call with Counsel re factual checking on PAP
60mins	1 July 21	Various emails and exchanges with County and Urban Design Team
15mins	30 June 21	Email to SR and Urban Design
15mins	29 June 21	Emails with Urban Design
240mins	25 Jun 21	Draft full PAP response and associated research including provision of zip file
	22 June 21	Email and review of correspondence for FLC re PAP
	22 June 21	Email to SR re PAP letter response technical matters
	22 June 21	Telephone call with SR
	21 June 21	Email SR re FLC correspondence
	14 June 21	Emails to SR re instructions on further FLC correspondence of 13 June 21
	10 June 21	Emails to SR re FLC correspondence of 10 June 21
	10 June 21	Detailed research and email to SR re grounds of PAP challenge points 5(1-3)
	10 June 21	Email to Director and SR re PAP letter of 8 June 21 and approach
555 mins		