*163 ASTON AND WESTCOTT MEADOW ACTION GROUP v THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT, MOLE VALLEY DISTRICT COUNCIL AND TAYLOR WIMPEY UK LTD

QUEEN'S BENCH DIVISION ADMINISTRATIVE COURT

10 July 2013

[2013] EWHC 1936 (Admin)

[2014] 2 P. & C.R. 10

Wyn Williams J.

10 July 2013

Areas of Outstanding Natural Beauty; Environmental impact; Planning inquiries; Planning inspectors; Planning permission; Screening opinions

H1 *Planning permission granted—interpretation of policy—Green Belt—whether screening opinion was lawful—procedural fairness*

H2 The claimants sought an order under s.288 of the Town and Country Planning Act 1990 ("TCPA") to quash the decision of the first defendant to allow an appeal by the third defendant against the failure of the second defendant to determine an application for planning permission for the erection of 14 dwellings at land to the rear of Springfield Road, Westcott, Dorking and to grant planning permission.

H3 The site fell within the Surrey Hills Area of Outstanding Natural Beauty ("the Surrey Hills AONB"). At the date of the Inspector's decision the development plan was the South East Plan, the Mole Valley Core Strategy and certain saved policies in the Mole Valley Local Plan. Policy CS1 of the Core Strategy provided that new development would be directed towards previously developed land within the built up area of Leatherhead. Limited development and in-filling would take place on previously developed land within identified larger rural villages. Westcott was one of the larger rural villages within this policy. The Local Plan provided the means by which the housing requirement for the period between 2006 and 2026 was to be met. If there should be a shortfall of housing land in the period before 2011, the second defendant would bring forward the development of reserve housing sites in accordance with the provisions of Policy HSG6 of the Mole Valley Local Plan. One of these sites was the appeal site, which had first been designated as such in 1983.

H4 The second defendant did not determine the application for planning permission within the specified time. The appeal against the non-determination was by way of public inquiry. This took place over three days in January 2012 and a further two days in March 2012. Both claimants appeared at the inquiry. The first claimant was a local resident. She was a sustainability consultant who specialised in flood risk. The first claimant gave evidence on the second day of the inquiry. Her evidence *164 related to the risk of flooding at the site. She was cross-examined by leading counsel for the third defendant. When the inquiry resumed in March 2012, the third defendant produced a written note in response to the first claimant's evidence. The note was prepared by one of the expert witnesses upon whom the third defendant relied. The first claimant had prepared detailed cross-examination questions for this expert on the issue of flood risk. However, the Inspector refused her request to cross-examine him. The reasons the Inspector gave for his decision were that flooding was not a determining matter in the appeal. He was very conscious of timing and there was a lot of business to get through. He had sufficient information regarding the first claimant's case and the response to it.

H5 At the commencement of the inquiry it was submitted that a screening opinion which had been adopted by the second defendant on April 11, 2010 was unlawful. The second defendant had written to the third defendant expressing the opinion that the proposed development was not EIA development within the meaning of the Town and Country Planning (Environmental Impact Assessment)(England) Regulations 1999 ("the 1999 Regulations"). The letter stated that although residential development was not specifically identified in Sch.2 to the 1999 Regulations , it could be considered to fall within the criteria of infrastructure developments and sub-category

urban developments projects. The site was located within the Surrey Hills AONB which was considered to be a “sensitive area” as defined within reg.2(1) . It was further stated that the site had been identified as a reserve housing site since 1980, having been re-evaluated by planning inspectors, with a principle of housing development on the site being acceptable in this location. An EIA could not question the principle of the proposed development, but only seek to ensure that it was sensitive to its location, which had already been previously considered through the development plan adoption processes.

H6 The claimants submitted that (1) the screening opinion issued by the second defendant was unlawful in that it took into account a variety of considerations which did not bear upon the key issue whether the development was likely to give rise to significant effects on the environment of the location concerned; (2) the Inspector failed to deal with the second claimant’s evidence and arguments on prematurity, interpretation of the Core Strategy, including compliance with Policy CS1 and so the development plans, and sustainability and failed to have regard to material considerations, had regard to mistaken and immaterial considerations and failed to give adequate or intelligible reasons; (3) the Inspector acted unfairly when he refused to allow the first claimant to cross-examine the expert witness; (4) that the term “major development” should be given the same meaning wherever it appeared in regulations or planning policy documents and, consequently, the proposal to erect 14 dwelling-houses upon the site constituted major development.

H7 **Held,** dismissing the application,

1. In its screening opinion the second defendant identified, correctly, that residential development was not a category of development which was specified in Sch.2 of the 1999 Regulations . Nonetheless, it acknowledged that the development might be considered as an urban development project. It also recognised that the development was to be carried out in a sensitive area. The remaining question for the second defendant was whether or not the development was “likely to have significant effects on the environment by virtue of factors such as its nature, size and location”. When a local planning authority adopted a screening opinion under the 1999 Regulations , it was engaged in a process which was, or ***165*** was akin to, exercising a planning judgment. The second defendant did not adopt an opinion which no reasonable planning authority could have adopted.

2. It was not impermissible for the second defendant to take account of the site’s status as a reserve housing site. As the screening opinion pointed out there had been a number of re-evaluations of the site by planning inspectors. It was obviously relevant that these processes had occurred and the site was considered suitable for residential development if other criteria were met, particularly since the environment of the site and its surroundings had remained largely or completely unaltered during this period and that the local environment must have been material to the decisions reached by various local plan inspectors. The phrase “An EIA cannot question the principle of the proposed development” may have been wrong looked at in isolation but the use of that phraseology did not demonstrate a substantial error of approach on the part of the second defendant when the opinion was read as a whole.

3. With regard to the consequences if the court had determined that the screening opinion was unlawful, both a suitably qualified officer within the Planning Inspectorate and the Inspector himself had concluded that this development was not EIA development. In these circumstances, there was no real possibility that if the second defendant had not taken account of extraneous matters (as the claimants believed them to be) it would have concluded that the development was EIA development.

4. By accepting the third defendant’s case regarding Policy CS1, the Inspector must have concluded that there was no material conflict with Policy CS1. His view was that the policies should be looked at as a package rather than each in isolation. The Inspector did not make any error of law in his approach to whether or not there was a breach of Policy CS1 nor did he fail to take into account a material consideration, namely the terms of Policy CS1. The Inspector concluded that the proposed development was generally in accordance with all the relevant development policies. He was entitled to exercise his planning judgment in so concluding. The Inspector attached very considerable weight to the fact that the land supply was 2.5 years when it should have been five years to accord with national policy. Accepting, as he did, the importance of this shortfall, the Inspector was entitled to conclude that the shortfall could only be met by reference to the reserved sites and the appeal site in particular. In so accepting, the Inspector

was rejecting the notion that planning permission should be refused on the grounds of non-conformity with Policy CS2 and/or prematurity. The Inspector explained in succinct but precise language why it was that he accepted the third defendant's case about housing shortfall. The reasoning provided by the Inspector did not demonstrate any real possibility of legal error nor was it so lacking in detail as to leave any doubt about why the case was being rejected on this issue.

5. The reasons give by the Inspector at the inquiry amply justified his decision to refuse to permit cross-examination by the first claimant on the issue of flooding. Although that issue was of interest to the first claimant and she believed that the risk of flooding was being underplayed, that risk had never been relied upon by the second defendant. Further, the consultees with expertise on the subject did not recommend that planning permission be refused on account of the risk of flooding. The Inspector was entitled to proceed on the basis that the risk of flooding was not likely to be a determining issue in the appeal and that cross-examination by the first claimant might cause an unnecessary prolongation of the inquiry. By the time the Inspector made his decision he had heard the first claimant's evidence and had ***166** received a written response on the issue of flood risk. He was aware of all the statutory responses on the issue. He was peculiarly well placed to make a decision about the need for cross-examination.

6. The court did not accept that the term "major development" should have a uniform meaning wherever it appeared in a policy document, procedural rule or Government guidance. It was more appropriate that the term should be construed in the context of the document in which it appeared. The context of the National Planning Policy Framework and paras 115 and 116 in particular, militated against the precise definition which was suggested should attach to the phrase. It was not appropriate to import a definition which was sensible and desirable in regulations or guidance concerned with procedural matters into a document intended to form a detailed policy framework. The Inspector made no error of law when he determined that the meaning of the phrase "major development" was that which would be understood from the normal usage of those words. The Inspector was entitled to conclude that the third defendant's application to erect 14 dwelling-houses on the site did not constitute an application for major development.

H8 Cases referred to in the judgment:

Bushell v Secretary of State for the Environment [1981] A.C. 75; [1980] 3 W.L.R. 22; [1980] 2 All E.R. 608

Gregory v Welsh Ministers [2013] EWHC 63 (Admin); [2013] Env. L.R. 19

Nicholson v Secretary of State for Energy and Another 76 L.G.R. 693; (1977) 245 E.G. 139; [1978] J.P.L. 39

R (Berky) v Newport City Council [2012] EWCA Civ 378; [2012] 2 C.M.L.R. 44; [2012] Env. L.R. 35 [2012] EWCA Civ 378; [2012] 2 C.M.L.R. 44; [2012] Env. L.R. 35

R (Burridge) v Breckland District Council & Another [2013] EWCA Civ 228; [2013] J.P.L. 1308

Walton v The Scottish Ministers [2012] UKSC 44; [2013] P.T.S.R. 51; 2013 S.C. (U.K.S.C.) 67

Younger Homes (Northern) Ltd v First Secretary of State & Another [2003] EWHC 3058 (Admin); [2004] J.P.L. 950

H9 Legislation referred to by the Court:

Town and Country Planning Act 1990

The Town and Country Planning (Determination by Inspectors)(Inquiries Procedure)(England) Rules 2000 (SI 2000/1625)

Town and Country Planning (Development Management Procedure) Order 2010 (SI 2010/2184)

The Town and Country Planning (Environmental Impact Assessment)(England and Wales) Regulations 1999 (SI 1999/293)

H10 **Claim** by the claimants, Deborah Jane Aston and Westcott Meadow Action Group, under s.288 of the Town and Country Planning Act 1990 seeking an order to quash the decision of the first defendant, the Secretary of State for Communities and Local Government, allowing an appeal (and granting planning permission) by the third defendant, Taylor Wimpey UK Ltd, against the failure of the second defendant, Mole Valley District Council, to determine an application for planning permission. The facts are as stated in the judgment of Mr Justice Wyn Williams. ***167**

H11 **Representation**

Richard Harwood Q.C. instructed by SJ Berwin LLP, for the Claimants.

Daniel Kolinsky instructed by the Treasury Solicitor, for the First Defendant.

The Second Defendant did not appear and was not represented.

James Strachan Q.C. instructed by Berwin Leighton Paisner LLP, for the Third Defendant.

Approved Judgment

Mr Justice Wyn Williams:

Introduction

1 In these proceedings, brought under s.288 of the Town and Country Planning Act 1990 , the Claimants seek an order quashing a decision made by a Planning Inspector duly appointed by the First Defendant. The decision in question was communicated by letter dated 30 April 2012 (hereinafter referred to as “the decision letter”) and followed an appeal to the First Defendant made by the Third Defendant against the failure of the Second Defendant to determine within the prescribed period an application for planning permission for the erection of 14 dwellings at land to the rear of Springfield Road, Westcott, Dorking RF4 3PD. The Inspector's decision was to allow the Third Defendant's appeal; he granted planning permission for the development which had been sought.

2 At the commencement of the hearing before me the Claimants and the First Defendant applied to adduce further evidence. Both applications were made very late in the day but it did not seem to me that any party would be prejudiced significantly if I allowed the applications. Accordingly I indicated at the hearing that I would permit the Claimants and the First Defendant to rely upon the further evidence served and that I would consider it in making my decision.

3 There are 4 discrete grounds in support of the claim that the Inspector's decision should be quashed. Before explaining those grounds and reaching conclusions upon them, however, it is necessary to set out relevant background.

The appeal site, its planning history and planning policy

4 The appeal site comprises approximately 1.94 hectares of rough grassland and other vegetation. It lies on the northern edge of the village of Westcott about 2 kilometres west of Dorking. The site is served by an existing hard surface vehicular access which passes between Lower Springfield Farmhouse (a grade II listed building) and the former farm buildings which have been converted into 3 dwellings. This means of access joins Westcott Street which is the main road within the village.

5 The appeal site falls entirely within the Surrey Hills Area of Outstanding Natural Beauty ("the Surrey Hills AONB"). As at the date of the Inspector's decision the Development Plan was the South East Plan, the Mole Valley Core Strategy and certain saved policies in the Mole Valley Local Plan. The Mole Valley Local Plan had been adopted in 2000; the Mole Valley Core Strategy was adopted in 2009.

6 The relevant parts of Core Strategy policies CS1 and CS2 are as follows:— ***168**

"Policy CS1

Where Development will be Directed (A Spatial Strategy)

In order to contribute towards the delivery of sustainable development and in accordance with the Vision:

"1. New development will be directed towards previously developed land within the built up area of Leatherhead, Dorking (including North Holmwood), Ashtead, Bookham and Fetcham……

2. Limited development (including re-development) and in-filling will take place on previously developed land within the identified larger rural villages and in-filling only on previously developed land within the small rural villages of the District.""

(Westcott is one of the larger rural villages within this policy.)

"Policy CS2

Housing Provision and Location.

The Council will make provision for at least 3760 net dwellings within the period 2006 and 2026 in accordance with the South East Plan Policy H1.

In meeting this requirement:

"1. Priority will be given to locating new residential development within the defined built up areas of Leatherhead, Dorking (including North Holmwood), Ashtead, Bookham and Fetcham.

> 2. In-filling and limited residential development (including re-development) will be permitted within Beare Green, Brockham, Capel, Charwood, Hookwood and Westcott.""

The phrase "limited residential development" is defined within policy CS2 to mean "more than in-filling, that is, more than just frontage development". The text accompanying that definition explains that the limited residential development will take place within the boundaries of the settlement as identified in the Mole Valley Local Plan 2000 and goes on to say that these boundaries will be reviewed as part of the "Land Allocations Development Plan Document". The reference to the Land Allocations DPD must be read in the context of the explanatory text which appears immediately after policy CS2. That text reads:—

> "The Council's indicative Housing Trajectory shows that the district housing requirement can be met without the need to use Green Belt/greenfield land until around 2016–2017. Before then the Council will prepare a land allocations development plan document. This will allocate housing sites in the built up area and incorporate a review of the Green Belt boundary to ensure sufficient land is allocated to meet the District's housing requirements and that a release mechanism is established to manage its delivery."

7 Paragraphs 6.1.3 to 6.1.19 of the Local Plan provide the means by which the housing requirement for the period between 2006 and 2026 is to be met. Paragraphs 6.1.7 contains this important sentence:— ****169***

> "If there should be a shortfall of housing land in the period before 2011, the Council will bring forward the development of the reserve housing sites in accordance with the provisions of policy HSG6 of the Mole Valley Local Plan (2000).

Policy HSG6 is headed "Reserve Housing Land" and provides:—

> "The District Council will continue to monitor housing land supply on an annual basis. If as a result of this process the Council is satisfied that land is required in addition to that allocated in policy HSG5 to meet the identified housing requirements of the Surrey Structure Plan 1994 for the period between 1 April 2001 – 31 March 2006, one or more of the following sites, as shown on the Proposals Map will be released:
>
> 1. Between Randall Road and Cleeve Road Leatherhead (2.9 ha/7.28 acres)
> 2. Fronting Clare Crescent, Leatherhead (0.9ha/2.2 acres)
> 3. Between Glenfield Close and Ridge Close, Strood Green, Brockham (3.2 ha/8.0 acres)
> 4. Marley Mead, Ridgeway Road, Dorking (1.3 ha/3.2 acres)
> 5. Rear of Springfield Road, Westcott (2.2ha/5.4 acres)"

The remaining wording of the policy makes it clear that site 5 (which is the appeal site) should be released for development only if the deficit in the shortfall in housing numbers was more than 150.

8 As the decision letter records the appeal site had long been a reserve housing site. It was first designated as such in the Dorking Area Local Plan which was adopted in 1983.

9 On 13 July 2010 the Third Defendant applied for planning permission for the erection of 34 dwellings on the appeal site. The Second Defendant refused the application; the notice of refusal gave 10 reasons for the decision. There followed detailed discussions and negotiations between the officers of the Second Defendant and representatives of the Third Defendant. The aim, apparently, was to produce a less intensive scheme which might be acceptable to the local planning authority and the highway authority. The application for planning permission to erect 14 houses was devised after taking account of the views expressed by the officers of the Second

Defendant and the County Council.

10 As I have said the Second Defendant did not determine the application within the specified time. However, following the appeal by the Third Defendant, it resolved that it would have refused planning permission for 6 reasons; they related to (1) harm to highway safety and the free flow of traffic on Westcott Street, (2) harm to highway safety and the free flow of traffic on Balchins Lane, (3) harm to pedestrians and other users of the public right of way through the appeal site, (4) and (5) the absence of a completed legal agreement to secure affordable housing and infrastructure contributions and (6) harm to the setting of the Grade II listed Lower Springfield Farmhouse and its historic outbuildings. By the time of the hearing of the appeal the Second Defendant had concluded an agreement with the Third Defendant pursuant to s.106 Town and Country Planning Act 1990 that resolved the Second Defendant's objections (4) and (5). Further, the Second Defendant had reached the conclusion that its objection (3) could be met with appropriate planning conditions ***170** .

Events at the public inquiry

11 The appeal was by way of public inquiry which was scheduled to last for three days. It opened on 10 January 2012 but at the end of the third day the proceedings had not been completed. Accordingly, two further days were set aside on 22 and 23 March 2012.

12 Both Claimants appeared at the inquiry. The First Claimant is a local resident. She is highly qualified and works as a sustainability consultant; one of her specialities is flood risk. The Second Claimant is a limited company formed by local residents to oppose development at the appeal site. The First Claimant is (and was at the time of the public inquiry) a member of the Second Claimant. Prior to the opening of the inquiry the Inspector had directed that the Second Claimant was entitled to appear at the inquiry notwithstanding that it was not a statutory party. Mr Harwood QC appeared for the Second Claimant at the inquiry and the First Claimant acted in person.

13 At the commencement of the inquiry Mr Harwood QC submitted that a screening opinion which had been adopted by the Second Defendant on 5 April 2011 was unlawful. The issue was deferred until 12 January 2012. By that time the Second Defendant had given its evidence. Detailed submissions about the lawfulness of the screening opinion and what should occur if it was not were made on behalf of the Second Claimant and the Second and Third Defendants. It is common ground that the Inspector did not rule upon those submissions there and then. His ruling came as part of the decision letter.

14 On the second day of the inquiry the First Claimant gave evidence. She handed to the Inspector “a detailed written statement” of her concerns – see Trial Bundle 3 Divider 43. Her evidence related to the risk of flooding at the appeal site. Leading Counsel for the Third Respondent cross-examined the First Claimant for a period of approximately 35 minutes – see her witness statement para.8. According to that witness statement the cross-examination was extensive and related to the risk of the appeal site flooding.

15 The Third Defendant does not accept that the First Claimant was cross-examined extensively on substantive issues relating to the risk of flooding. It relies on witness evidence to the effect that the questions in cross-examination were directed at establishing that the objections raised by the First Claimant had been considered by the Second Defendant, its independent consultant and other statutory consultees and that all those parties were of the view that there was no basis for an objection based upon flood risk – see the witness statements of Mr Brimmer at para.13 and Mr Brown at para.18.

16 In her second witness statement the First Claimant takes issue with that description of the cross-examination to which she was subject. She maintains that it was detailed and challenging. There is no way I can resolve this conflict given that there is no transcript of what occurred. Given the agreed time estimate over which the questioning occurred it is unlikely to have gone into significant detail.

17 When the inquiry resumed on 22 March the Third Defendant produced a written note in response to Dr Aston's evidence. The note was prepared by Mr Brimmer. He was one of the expert witnesses upon whom the Third Defendant relied and he was competent to give evidence on the issue of flood risk although the substance of his proof of evidence was confined to matters

of transportation and highway safety. When he gave his evidence in chief he was asked no questions about matters ***171*** relating to flood risk; my understanding is that evidence in chief was limited to matters contained within the proof of evidence. It had always been the intention of the Third Defendant to rely upon the note on the risk of flooding as a discrete written response to the evidence of the First Claimant.

18 Dr Aston had prepared detailed cross-examination questions for Mr Brimmer on the issue of flood risk. However, the Inspector refused her request to cross-examine him. Shortly after this decision was made leading Counsel for the Second Claimant asked the Inspector to explain his decision. A note of what the Inspector said reads:—

> "Don't regard flooding as a determining matter – this appeal, neither do main parties or [environment agency]. Very conscious of timing. There is a lot of business we must get through. I decided we would not allow any further evidence on a peripheral issue.
>
> Have Dr Aston's case, and Appellant's response to it. Have sufficient information on it. So for expediting inquiry timing then we are proceeding as we are."

19 The Inspector has provided a witness statement dated 27 February 2013. At paras 4 to 6 he provides information about why he decided to refuse the First Claimant's request to cross-examine Mr Brimmer. I quote:—

> "4. In making my decision on this matter, I started from the position that interested persons can only put questions to opposing witnesses at the Inspector's discretion. Applying that discretion, I decided that:—
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> a) (based on all the submitted evidence) flood risk was not likely to be a determining issue in the appeal;
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> b) I already knew Dr Aston's case, both verbal and written, and also had ample written evidence on flood risk from the Appellants;
>
> c) It simply was not expedient to spend further inquiry time on the matter.
>
> 5. I emphasised that this inquiry, originally scheduled for 3 days, had overrun to require a further 2 days (a Thursday and Friday after a long adjournment), and I had repeatedly reminded all parties that it must be concluded within the 5 days. In the event, we finished at 6pm on the last day, Friday.
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> 6. Given that timing, and had I allowed Ms Aston to put questions and receive answers on flood risk (together of a duration I was not in a position to predict), I believed – and I definitely thought at the time – that there was every likelihood that it would have been necessary to adjourn the inquiry again, to a date which may not have been agreed and fixed at the time of the adjournment but which may have had to be discussed and negotiated subsequently, via the Planning Inspectorate's Charting Managers, working with the 3 Counsel and others. I believe that this would have been regarded as an unwarranted delay and a waste of time and expense by virtually all the participants in the inquiry."

This explanation is very similar, albeit longer, to that which was noted by the parties when the Inspector gave his oral reasons for refusing cross-examination. ***172***

Ground 1

20 The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("the 1999 Regulations") were in force at the time the Third Defendant made its application for planning permission for the erection of 14 dwellings on the appeal site. Prior to making the application the Third Defendant made a request to the Second Defendant to adopt a screening opinion as to whether or not the proposed development constituted "EIA development" within those Regulations. Development is EIA development within the Regulations if it is Sch.1 development or Sch.2 development which is likely to have significant effects on the environment by virtue of factors such as its nature, size or location (see Reg.2). If a planning authority adopt an opinion that proposed development is EIA Development it shall not grant planning permission

for the development without first taking “environmental information” (as defined in Reg.2) into account and stating that they have done so (see Reg.3(2)).

21 On 5 April 2011 the appropriate officer of the Second Defendant wrote to the Third Defendant's agent expressing the opinion that the proposed development was not considered by the Second Defendant to be EIA development. The material parts of the letter are as follows:—

> “Having considered the revised proposed development of the aforementioned site it is deemed that this would not fall within the parameters set out in Sch.1 to the Regulations and does not therefore automatically require an Environmental Impact Assessment (EIA). The proposal has then subsequently been considered under Sch.2 to the Regulations , which set out indicative criteria and thresholds for determining if development will require an EIA.
>
> Residential development is not specifically identified in Sch.2 , however, it could be considered to fall within the criteria of *infrastructure developments* and sub-category *urban development projects.* This sub-category sets out thresholds for the requirement of an EIA, including the following: *the development would have significant urbanising effects in a previously non-urbanised area (e.g. a new development of more than 1000 dwellings).* Whilst these thresholds are not exhaustive the revised proposal for the above site would be for a residential scheme numbering 14 No dwellings, very significantly below the level specified. In addition, the revised proposal would result in considerably less development than the scheme previously considered for this site, for which an EIA was not required following a formal screening opinion.
>
> The site is located within the Surrey Hills Area Of Outstanding Natural Beauty, which is considered a ‘sensitive area’ as defined within Reg.2(1) . However, the situation of the site within a sensitive area does not automatically require an EIA, the key question being whether or not the project would be likely to give rise to significant effects on the environment of the location concerned.
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> The site to the rear of Springfield Road, Westcott has been identified as a reserve housing site since the Dorking Area Local Plan of 1980, having since been re-evaluated by Planning Inspectors, with a principle of housing development on this site being considered acceptable in this location within the ANOB. An EIA cannot question the principle of the proposed development, but only seek to ensure that it is sensitive to its location, which has already been previously considered through the development plan adoption processes. ***173*** In line with the screening opinion issued in respect of the previous scheme for up to 40 No. dwellings on this site, it is the opinion of this Council, as local planning authority, that the submission of an EIA would not bring anything further to the consideration of a planning application.”

22 Mr Harwood QC submits that this screening opinion was unlawful. At para.81 of his skeleton argument he identifies what he describes as the principal legal errors which it contains. At para.82 he identifies further errors of law which he accepts are not such as would render the opinion as a whole unlawful but which he contends demonstrate that the Second Defendant failed to understand or apply the 1999 Regulations .

23 Before dealing with these points in some detail it is as well to set out some uncontroversial preliminary matters. First, a screening opinion is not to be interpreted as if it was a comprehensive analysis written by a lawyer to be subject to legalistic technical scrutiny–see Younger Homes (Northern) Ltd v First Secretary of State & Another [2004] JPL 950 . Second, the issue for the Second Defendant was whether or not the proposed development was Sch.2 development which was likely to have significant effects on the environment by virtue of factors such its nature size or location. Sch.2 development means development of a description mentioned in Column 1 of the table in the Schedule where any part of the development is to be carried out in a sensitive area–see Reg.2 . Third, Sch.3 to the 1999 Regulations provides “selection criteria” for screening Sch.2 development. Reg.4(5) provides that a local planning authority must take account of any relevant selection criteria when deciding whether Sch.2 development is EIA development. Fourth, : Environmental Impact Assessment provides guidance to local planning authorities about the approach they should adopt when assessing whether development falling within Sch.2 constitutes EIA development.

24 In its screening opinion of 5 April 2011 the Second Defendant identified, correctly, that residential development was not a category of development which was specified within column 1 of the table in Sch.2 . Nonetheless it acknowledged that the development might be considered as an urban development project within category 10–Infrastructure projects. It also recognised that the development was to be carried out in a sensitive area–the Surrey Hills AONB. The remaining question for the Second Defendant was whether or not the development was "likely to have significant effects on the environment by virtue of factors such as its nature, size and location".

25 Mr Harwood QC acknowledges that the Second Defendant identified the only category of development within Sch.2 which was potentially applicable. He also acknowledges that the Second Defendant asked itself the correct question i.e. "whether that development was likely to give rise to significant effects on the environment of the location concerned". Indeed that question was identified as a "key question" within the screening opinion. Mr Harwood's principal contention, however, is that the Second Defendant failed to answer the "key question" which it had posed for itself. Rather, submits Mr Harwood, the Second Defendant took into account a variety of considerations which did not bear upon the key issue. For this submission Mr Harwood QC relies, in particular, upon the terms of the last substantive paragraph of the letter of 5 April 2011 — see para.21 above. Mr Harwood QC submits that the Second Defendant's reliance upon the fact that the appeal site had been included within local plans for possible residential development ***174*** was misplaced as was its reliance upon the notion that the principle of residential development had been established. Mr Harwood QC also complains that the Second Defendant failed to consider the criteria set out in Sch.3 of the 1999 Regulations and was wrong to conclude that "the submission of an EIA would not bring anything further to the consideration of a planning application".

26 In the Younger Homes case Ouseley J expressly acknowledged the possibility that a screening opinion might be "so defective" as to be liable to be quashed – see para.81. In the appeal against the decision of Ouseley J the Court of Appeal said nothing to cast doubt upon that proposition. As far as I am aware, however, there has been no further analysis in the case law of what that phrase is intended to convey.

27 In his skeleton argument Mr Kolinsky acknowledges that the screening opinion was not "a flawless treatise on the application of the EIA Regulations ". He accepts that the mere fact that a site has been allocated in a local plan for a particular type of development does not resolve the question of whether there would be likely to be significant effects on the environment should that development be implemented. Nonetheless, the stance adopted by Mr Kolinsky is that read as a whole and in its proper context the screening opinion of 5 April 2011 demonstrates that the Second Defendant had asked itself the correct question and that, having done so, it had formed the clear opinion that the proposed development was not EIA development. Mr Kolinsky submits that when a local planning authority identifies, correctly, the key issue to be addressed or the key question to be answered it will be rare for a court to conclude that the planning authority did not address the issue or answer the question.

28 Mr Strachan QC adopts a similar position to Mr Kolinsky. Additionally, he stresses that the Second Defendant's legal obligation was to adopt an opinion; on any view, he submits, that it clearly did. It was only if the Second Defendant had concluded that the proposed development was EIA development that it was under a duty to provide a written statement setting out "the full reasons for that conclusion"–see Reg.4(6) of the 1999 Regulations . It would be wrong, submits Mr Strachan, to categorise the screening opinion provided by the Second Defendant as unlawful when it asked itself the correct question and answered it decisively even if parts of the reasoning process by which the decision was reached are open to criticism.

29 In my judgment, when a local planning authority adopts a screening opinion under the 1999 Regulations it is engaged in a process which is or is akin to exercising a planning judgment. There are, now, a plethora of cases which demonstrate the difficulties which Claimants face in seeking to persuade this court that a decision which is dependent upon the exercise of planning judgment should be quashed. Essentially, such a decision may be quashed on classic *Wednesbury* grounds but the threshold is a high one. No doubt that is why Ouseley J used the phraseology he did in Younger Homes .

30 I am not persuaded that the Second Defendant adopted an opinion which no reasonable local planning authority could have adopted. Mr Harwood QC did not suggest as much. Further, I am not persuaded that the screening opinion, read reasonably and as a whole, demonstrates that

the Second Defendant's reasoning process was flawed to the extent necessary to render it unlawful. There can be no doubt that the Second Defendant took account of considerations which were material in reaching its conclusion. For example, it recognised, explicitly, that the appeal ***175*** site was located within the Surrey Hills AONB. Such an area is a "sensitive area" within the 1999 Regulations as the Second Defendant acknowledged expressly. The screening opinion mentioned, specifically, the nature of the development and the number of houses envisaged. In other words it addressed, directly, the nature, size and location of the proposed development.

31 I do not think it was impermissible for the Second Defendant to take account of the appeal site's status as a reserve housing site. That had been its status for a little more than 30 years at the time the Second Defendant adopted its screening opinion. As the screening opinion points out there had been a number of re-evaluations of the site by planning inspectors in that period of time–that was an inevitable part of the various local plan processes. In my judgment, it was obviously relevant that these processes had occurred and the site considered suitable for residential development if other criteria were met, particularly since the environment of the appeal site and its surroundings had remained largely or completely unaltered during this period and that the local environment must have been material to the decisions reached by the various local plan inspectors. The phrase "An EIA cannot question the principle of the proposed development….." may have been wrong looked at in isolation but I do not consider that the use of that phraseology demonstrates a substantial error of approach on the part of the Second Defendant when the opinion is read as a whole.

32 It is clear, too, that the Second Defendant took account of aspects of the guidance within . In particular it took account of the guidance related to "urban development projects". Paragraph A19 of the Circular reads:—

> "Development proposed for sites which have not previously been intensively developed are more likely to require EIA if:
>
> • The site area of the scheme is more than 5 hectares; or
>
> • It would provide a total of more than 10,000 square metres of new commercial floor space; or
>
> • The development would have significant urbanising effects in a previously non-urbanised area (e.g. a new development of more than 1,000 dwellings)."

The screening opinion quoted that part of the guidance relating to the provision of dwellings. I appreciate that the screening opinion appears to confuse the guidance in that Circular with the selection criteria in Sch.3 . However, I am satisfied that the Second Defendant was relying upon the substance of the advice in the Circular and that it was entitled so to do in reaching its conclusion.

33 Mr Harwood QC is correct to submit that there is no express reference within the screening opinion to the selection criteria within Sch.3 . It is now trite law that a decision-maker need not refer, expressly, to every consideration which has led him to his decision. Given that it was mandatory for the Second Defendant to take account of the selection criteria and that the screening opinion contains express references to the Regulations on more than one occasion I am simply not prepared to find that the Second Defendant either consciously or inadvertently failed to take the selection criteria into account in reaching its decision.

34 I have reached the clear conclusion that the Claimants have failed to demonstrate that the screening opinion was unlawful. That is sufficient to dispose of ground 1. ***176***

35 During the course of oral submissions there was considerable debate about what the consequence would be if I were to conclude that the opinion was unlawful. Out of deference to the detailed and careful arguments of Counsel I deal with this issue, too, albeit in less detail than would have been necessary had I concluded that the screening opinion was unlawful.

36 Mr Harwood QC submits that if the screening opinion adopted by the Second Defendant was

unlawful it falls to be quashed notwithstanding that the Inspector appears to have concluded that the opinion was lawful. The Inspector dealt with this issue in one short paragraph in his decision letter. Paragraph 4 reads:—

> "During the first part of the Inquiry, Counsel [for the Second Claimant] queried whether the Council had properly published a screening opinion, in accordance with Reg.5(1) of the [1999 Regulations] as to whether the proposals amounted to EIA development. The Council's opinion had been that the proposals would not fulfil the relevant criteria in the Regulations, and would not therefore require EIA. Having heard representations from all three parties on this matter, I agree with that; the effects of the proposed development are not of such significance as to warrant EIA. Accordingly, I have not considered it necessary to make or seek a screening direction under the Regulations."

37 It is not entirely clear whether the Inspector reached a decided view upon whether the screening opinion was lawful or unlawful. His reasoning is consistent with the view that he considered the screening opinion to be lawful; equally, it is at least arguable that the Inspector was concluding, simply, that he agreed with the view expressed by the Second Defendant that the proposed development was not EIA development.

38 Mr Harwood QC submits that if the Inspector considered the screening opinion to be lawful he made an error of law. I have already explained why I do not consider that to be the case. However, upon the assumption that I am wrong and that the screening opinion was unlawful it follows, inevitably, that the Inspector himself erred in law if he found the opinion to be lawful. In those circumstances the finding of the Inspector to the effect that the screening opinion was lawful would be no bar to a quashing order.

39 The next step in Mr Harwood's argument is that if the screening opinion was unlawful the planning permission granted by the Inspector must be quashed. Mr Harwood QC submits that the illegality of the screening opinion has never been cured by any appropriate process and, that being so, the appropriate course for this court to take is to quash the planning permission granted by the Inspector. Mr Harwood QC acknowledges that it would have been open to the Claimants to seek a quashing order once the Second Defendant had adopted its screening opinion. They did not do that preferring to wait to see whether or not planning permission was granted to the Third Defendant.

40 For the purposes of this judgment I am prepared to assume that this procedural approach was open to the Claimants; that seems to me to be consistent with the reasoning of the Court of Appeal in the very recent case of *R (Burridge) v Breckland District Council & Another [2013] EWCA Civ 228* .

41 Mr Kolinsky and Mr Strachan QC submit that even if the screening opinion was unlawful there is no proper basis upon which to quash the planning permission. Mr Kolinsky relies, in particular, upon the decisions in *R (Berky) v Newport City Council [2012] 2 T & CR12* ***177*** and *Walton v The Scottish Ministers [2012] UKSC 44* .

42 In *Berky* an objector to a proposed development sought judicial review of the grant of planning permission on a number of grounds including the allegation that the planning authority had erred in law in concluding that the proposed development was not EIA development. The local planning authority had adopted a screening opinion to that effect which gave scant reasons for the opinion. During the course of his judgment Carnwath LJ, with whom Moore-Bick LJ agreed, said:—

> "22. I confess finding this whole discussion somewhat sterile. The issue at this stage is not the validity of the screening opinion as such, but whether a flawed screening opinion led to failure to conduct an EIA, and accordingly undermined the legality of the planning process. The screening letter could and should have been more fully reasoned, ….."

In *Walton* the Supreme Court was careful to say that the court retains a discretion to withhold a quashing order even in circumstances where there has been breach of a European Directive and/or a breach of Regulations which transpose a Directive into English and Welsh or Scottish law–see, in particular, Lord Carnwath at para.138 and Lord Hope at para.155.

43 Both Mr Kolinsky and Mr Strachan QC rely heavily upon the very recent decision of the Court of Appeal in *Burridge* . In that case the facts, in summary, were these. The Interested Party made an application to the Defendant for planning permission for the construction of a biomass renewable energy plant (application 1372). In a separate application it sought planning permission for a combined heat and power plant on land nearby (application 0445). The planning officer's report to the Defendant's development control committee in relation to application 0445 stated that the plant would be fuelled by biogas produced by the renewable energy plant which was the subject of application 1372. The proposal in 0445 included provision for an underground gas pipe line to carry the fuel between the two sites. The report on application 1372 referred to an amendment to the scheme for the plant submitted earlier under the same number. Apparently the amendment was intended to have the environmental advantage of moving a part of the installation farther away from a village. The two reports to Committee were cross-referenced to each other. In each case it was recommended that planning permission be granted. The applications were considered and approved by the committee on the same day.

44 The Claimant in the proceedings was a local resident. Her claim was that the permission should be quashed for failure to submit the applications considered on 31 October 2011 to a screening opinion. It was common ground that a screening opinion had been adopted with respect to the un-amended application 1372 but the Claimant's case was that a further screening opinion should have been adopted before the two applications were considered and approved by the planning committee.

45 The judge at first instance dismissed the claim on the basis that there was no need for the further screening opinion. He went on to conclude, however, that if he was wrong in that conclusion the planning permissions should not be quashed since, on the basis of the evidence presented to him, there would have been no different outcome had there been a further screening opinion. The planning authority would, inevitably, have concluded that the development was not EIA development. ***178**

46 On appeal the court unanimously concluded that the planning authority should have adopted a further screening opinion and that in failing to do so they had acted unlawfully. Nonetheless the majority declined to grant a quashing order. In their view the judge was entitled to conclude that the outcome would have been no different had there been a further screening opinion and the planning authority would have concluded that the development was not EIA development. The reasoning which led to that conclusion is encapsulated in the following passage from the judgment of Warren J:—

> "113. Since Mr Moyes did not produce a further screening opinion, that is to say a written statement that the development was, or was not, EIA development, and since the Council took no other steps in relation to the 1999 Regulations , there was a failure to comply with the letter of the 1999 Regulations ; the Council was thereby in breach of its obligations. This failure, I note, had nothing to do with an absence of reasons: rather it was a failure to provide a written statement as required by the 1999 Regulations at all.
>
> 114. What, then, is the impact of this failure to comply with the 1999 Regulations ? In addressing that question, it is to be noted that there is nothing in the 1999 Regulations which expressly states that a planning authority is not to grant planning permission in relation to Sch.2 development which is not EIA development without having first adopted a screening opinion: contrast the position in relation to Sch.2 development which is EIA development, in which case Reg.3(2) provides that a planning authority must not grant planning permission unless it has taken environmental information (as defined) into consideration.
>
> 115. Of course, a planning authority cannot know whether or not a particular Sch.2 development is likely to have significant effects on the environment (and thus constitute EIA development) without carrying out an investigation. That is the purpose of the screening exercise and the adoption of a screening opinion, each of which is thus an important part of the planning process.
>
> 116. It can, therefore, be suggested that a failure to comply with the screening requirements amounts to a fatal flaw in the process leading to the grant of planning permission so that the permission granted is thus vitiated and should be quashed. That

> may be correct as a general rule. But, so it seems to me, it must be possible to allow for cases, call them exceptional cases if you will, where a failure to comply strictly with the requirements of the 1999 Regulations in relation to screening should not result in the invalidity of the grant of planning permission for the development in question. Whether such a grant is vitiated will all depend on the facts of the particular case.
>
> 117. In the present case, the important factors are these. First, there was a full screening opinion in relation to the original application 1372 about which no complaint has been, or could be, made. Secondly, Mr Moyes, taking into account all of the features of the revised proposals, saw no need for further screening, concluding that the development, (whether assessed by reference to its individual elements or by reference to the overall development) would not have significant effects on the environment. That development was not, on the basis of Mr Moyes' views, EIA development. There was, on these facts, an effective screening of the revised proposals and the relevant person (Mr Moyes) charged with discharging responsibilities of the Council had validly ****179*** formed the opinion that that development would not have significant effects on the environment. The only conclusion which he could have reached was that the development was not EIA development. His failure was not to reduce that opinion into writing.
>
> 118. In my judgment existence of the original screening opinion coupled with the way in which Mr Moyes subsequently addressed the revised proposals and that changes (if any) on the environmental aspects of the revisions and the conclusions which he reached bring the case within the exceptional category which I have described. The failure to produce a written statement expressing those conclusions should not, I consider, vitiate the planning permission actually granted….."

47 Both Mr Kolinsky and Mr Strachan QC submit that there is compelling evidence that the Second Defendant would have concluded that the proposed development was not EIA development had it adopted a lawful screening opinion. There are two principal reasons why they advance this submission.

48 The first reason relates to what transpired when the Third Defendant's appeal was lodged at the Planning Inspectorate. I have before me a witness statement of Miss Tracey Smith who is an Executive Officer in the Environmental Services Team at the Inspectorate. In that statement she says that once an appeal is received a process is followed so as to establish if the case requires screening. The case officer who is charged with this responsibility considers 4 questions which are (i) does the development fall within Sch.2 of the EIA Regulations ? (ii) is the development excluded from screening? (ii) does the site fall within a sensitive area? (iv) does the site area exceed 0.5 ha? If it is established that screening is necessary a check list is completed to establish if the proposal under appeal is EIA development.

49 According to Miss Smith, once the check list is completed the case officer seeks to establish whether a screening exercise has been carried out by the local planning authority and whether a screening opinion was adopted. If a screening opinion has been adopted by the local planning authority the case officer considers whether or not the opinion of the local planning authority accords with the conclusion reached as a consequence of completing the check list. If a screening opinion has been adopted and that opinion is the same as the opinion produced as a consequence of completing the check list no further action is taken. If, however, no screening opinion has been adopted by the local planning authority or if the conclusion reached by the local planning authority is at variance with the conclusion reached as a consequence of the check list procedure a formal screening direction is issue on behalf of the First Defendant.

50 As an exhibit to her witness statement Miss Smith produces the check list which was completed by a case officer named Linda Rossiter on 18 October 2011 in respect of the development proposed by the Third Defendant. The conclusion of the check list is self-evident, namely, that the proposed development was not EIA development.

51 In his oral submissions Mr Harwood made a number of criticisms of the answers provided by the case officer to the various questions in the check list. With respect to Mr Harwood QC they are matters of comparatively minor detail and cannot, in my judgment, invalidate the conclusion reached that the proposed development was not EIA development. ****180***

52 In essence, therefore, a separate screening exercise was undertaken on behalf of the

Secretary of State and it reached the conclusion that the proposed development was not EIA development. I accept that this is very powerful evidence to demonstrate that a lawful screening opinion would, inevitably, conclude that the proposed development was not EIA development.

53 The First and Third Defendant also rely upon the fact that the issue of whether or not the screening opinion adopted by the Second Defendant was lawful and/or whether the proposed development was EIA development was the subject of vigorous debate before the Inspector. His conclusion about that issue has been set out at para.36 above. On any view, the Inspector concluded that the proposed development was not EIA development.

54 The plain fact is that both a suitably qualified officer within the Planning Inspectorate and the Inspector himself has concluded that this development was not EIA development. In these circumstances I accept the submission on behalf of the First and Third Defendants that there is no real possibility that if the Second Defendant had not taken account of extraneous matters (as the Claimants believe them to be) it would have concluded that the development was EIA development, thereby triggering the need for environmental information.

55 I should mention, finally, a further issue which was raised in the argument before me. Mr Harwood QC submits that the Inspector acted unlawfully when he took it upon himself to determine the issue of whether the development was EIA development. He submits that Reg.9(2) of the 1999 Regulations , properly interpreted, compelled the Inspector to seek a screening direction from the First Defendant as to whether or not the proposed development was EIA development. Reg.9(2) provides as follows:—

> "Where an Inspector is dealing with an appeal and a question arises as to whether the relevant application is an EIA application and it appears to the Inspector that it may be such an application the Inspector shall refer that question to the Secretary of State and shall not determine the appeal, except by refusing planning permission…., before he receives a screening direction."

56 Mr Harwood QC submits, in effect, that once the issue is raised as to whether a proposed development is EIA development the Inspector is bound to refer the issue to the Secretary of State and the Inspector has no jurisdiction to allow an appeal until a screening direction has been made. For that submission he relies, heavily, upon the decision of HH Judge Keyser QC (sitting as a Deputy High Court Judge) in *Gregory v Welsh Ministers [2013] EWHC 63 (Admin)* .

57 In *Gregory* Counsel for the Welsh Ministers made an express concession that the relevant planning application might be an EIA application. In the instant case there is no such concession.

58 How the phrase "and it appears to the Inspector it may be such an application" in Reg.9(2) should be interpreted and applied is capable of causing some difficulty. Is the Inspector to refer the matter to the Secretary of State simply because someone at the inquiry alleges that the application is an EIA application? What is his approach to be if, as here, the local planning authority and the appellant agree that the application is not an EIA application? Is the Inspector, himself, to make at least a preliminary judgment about whether the application is an EIA application? If so, to what extent is the Inspector to investigate? ***181**

59 There is no need to delve into these issues in this case, and, in my judgment, it would be preferable for a judge to grapple with them when they are at the heart of the decision which he has to make. There is a limit to the utility of obiter dicta by judges at first instance.

Ground 2

60 This ground is formulated as follows in the skeleton argument prepared by Mr Harwood QC.

> "(ii) The Inspector failed to deal with WMAG's evidence and arguments on prematurity, interpretation of the Core Strategy (including compliance with policy CS1 and so the development plans), and sustainability, instead mis-stating WMAG's case by dealing with the point WMAG had expressly dropped on housing numbers. In doing so he failed to have regard to material considerations, had regard to mistaken, and so flawed, immaterial considerations and failed to give adequate or intelligible reasons."

As is obvious, a number of separate but related issues arise for consideration.

61 Mr Harwood QC's first complaint is that the Inspector failed to take account of the planning points taken by the Second Claimant as they related to the Core Strategy. The case for the First Claimant before the Inspector was that the proposed development was in breach of policy CS1. Further it is submitted that this was common ground before the Inspector. Yet, according to Mr Harwood QC, there is no mention either of CS1 or of the agreement that there was a breach of that policy in the decision letter.

62 It is correct that there is no express reference to policy CS1 in the decision letter. However, both Mr Kolinsky and Mr Strachan QC submit that it was never common ground before the Inspector that the proposed development was in conflict or a breach of CS1 and, further, it is obvious from the decision letter what view the Inspector took about the suggestion that there was a breach.

63 I have reviewed all the evidence relating to the issue of whether it was common ground that the proposed development would constitute a breach of policy CS1. In particular I have reviewed the sources of evidence identified at para.69 of Mr Kolinsky's skeleton argument and at para.63 of the skeleton argument of Mr Strachan QC. I can find no convincing basis upon which it would be proper to conclude that the parties at the inquiry had agreed that the proposed development was in breach of policy CS1. I accept that in an answer to a question in cross-examination Mr Brown apparently accepted that there was a breach of the policy if that policy was viewed in isolation but in re-examination he made it clear that policy CS1 should not be viewed in isolation but, rather, as one of a number of interlinking policies. The whole thrust of the case for the Third Defendant was there was a range of policies and supporting text within the Core Strategy but not confined to the Core Strategy which needed to be considered as a whole.

64 Was the proposed development in conflict with policy CS1 when CS1 is put into its correct context? The Third Defendant's case at the inquiry was that the policy could not be properly understood or applied without putting it into the context of other relevant policies in the Core Strategy and the preserved policy HSG 6 of the Mole Valley Local Plan. Paragraph 6.1.7 of the Core Strategy is capable of one meaning only. It is that in the event of a housing shortfall in the ***182*** period up to 2011 the reserve housing sites would be brought forward in accordance with saved policy HSG6.

65 There can be no doubt that the Inspector accepted the Third Defendant's case on this point. At para.15 of the decision letter the Inspector explained

> "The appeal site has long been a reserved housing site. It was first so designated in the Dorking Area Local Plan, (adopted 1983) and the designation was perpetuated through policy HSG6 in the Mole Valley Local Plan. This is and remains (post-NPPF) a saved development plan policy. Neither plans specifies the housing numbers to be built on the site. The CS refers to reserve housing sites at its paragraph 6.1.7, which states that if there is a housing shortfall, the reserve housing sites will be brought forward in accordance with the saved policy HSG6. The Council's most recent estimate, contained in a report to The Executive dated 6 March 2012, is that it has a deliverable housing land supply of just over 2.5 years. This is substantially less than the 5 year requirement specified in national planning policy"

66 In my judgement Mr Kolinsky and Mr Strachan QC are correct when they submit that by accepting this part of the Third Defendant's case the Inspector must also have concluded that there was no material conflict with policy CS1. His view was that the policies should be looked at as a package rather than each in isolation. Such a conclusion followed, inexorably, from an acceptance of the Third Defendant's case. I am unpersuaded that the Inspector made any error of law in his approach to whether or not there was a breach of policy CS1; nor am I persuaded that he failed to take into account a material consideration, namely, the terms of policy CS1.

67 I am fortified in this view by the terms of para.46 of the decision letter. It reads:—

> "The proposals would have many merits in terms of helping to meet the district housing requirements, including the need for affordable housing, and in terms of their layout and

> design. They would be generally in accordance with the relevant NPPF and development plan policies."

68 In my judgment the last sentence of that paragraph must be read as referring to all the relevant development plan policies drawn to the Inspector's attention which, of course, includes CS1 and, for that matter, CS2. That means that the Inspector concluded that the proposed development was generally in accordance with all the relevant development plan polices. The Inspector was entitled to exercise his planning judgment by so concluding.

69 Mr Harwood QC also submits that the grant of planning permission for the proposed development was in conflict with policy CS2 and the explanatory material to the policy. Mr Harwood submits that the proposed development was not limited residential development; further he submits that the grant of planning permission was premature given that the settlement boundaries were to be reviewed as part of the Land Allocations DPD – a process which had not taken place.

70 Mr Kolinsky and Mr Strachan QC submit the answer to these submissions is straightforward and to be found in the last sentences of para.15 and paras 36, 37 and 46 of the decision letter. Paragraph 15 of the decision letter is set out at para.61 above. Paragraphs 36 and 37 read as follows:— ***183***

> "36. As mentioned above, the Council and the Appellants agree that the district has currently only a 2.5 year land supply, as against the 5 year requirement described in the NPPF (and in its predecessor, PPS3 *Housing*). In that situation, PPS3 advised that local planning authorities should consider favourably planning applications for housing, having regard to certain other considerations. A similar approach is taken in the NPPF, which lends strong support to the new housing development. WMAG however argues that owing to the likely imminent revocation of the South East Plan which is the ultimate source of the district housing land requirement, that requirement is likely soon to change, and should not therefore be relied upon.
>
> 37. I do not agree with WMAG on this point. The simple fact is that even if the SEP is soon to be revoked, its housing land requirement remains embedded in the CS. Revocation would not therefore alter the current identified shortfall in housing land supply, which I judge to be both significant and serious. And in this case nothing contradicts the NPPF's presumption in favour of sustainable forms of housing which is an important part of its general presumption in favour of sustainable development. In this context, I regard the provision of four affordable dwellings as a notable merit of the appeal scheme, which is fully supported by development plan housing policies."

71 It is clear from paras 15, 36 and 37 that the Inspector attached very considerable weight to the fact that the land supply was 2.5 years when it should have been 5 years to accord with national policy. Accepting, as he did, the importance of this shortfall, the Inspector was entitled to conclude that the shortfall could only be met by reference to the reserved sites and the appeal site in particular. In so accepting, inevitably, the Inspector was rejecting the notion that planning permission should be refused on the grounds of non-conformity with CS2 and/or prematurity.

72 Mr Harwood QC also complains that the Inspector addressed the issue of housing land supply in his decision letter in a manner which suggests that the Second Claimant was taking issue with the figures relied upon but he did not deal, expressly, either with the alleged breach of policy or with prematurity. Yet, by the time of closing submissions, the Second Claimant was not pursuing an argument about housing land supply whereas there were heated live issues about breach of policy and prematurity.

73 In my judgment Mr Harwood QC's approach is too analytical. The issue of housing land supply was inextricably linked to the approach the Inspector would take to policies CS1 and CS2 together with other national policies to which the Inspector makes reference. In my judgment he was entitled to stress the issue of housing land supply and once the Inspector accepted that there was a significant and immediate shortfall in respect of housing land supply he was entitled to and did reject the suggestion that the grant of planning permission was premature and that

there was a breach of development plan policies. This was encapsulated, in particular in para.46 of the decision letter–see above.

74 I have reached the clear conclusion that the Inspector did not fail to take account of material considerations as is suggested.

75 As an alternative, Mr Harwood QC submits that the Inspector failed to provide adequate and intelligible reasons as to why he rejected the Second Claimant's case on breach of policy and prematurity. I do not propose to rehearse the many authorities which analyse the extent of the duty to give reasons. I accept that the ***184*** decision letter must be read in a straightforward manner, recognising that it is addressed to parties well aware of the issues involved and the arguments advanced and that the degree of particularity of the reasoning is entirely dependent upon the nature of the issue falling for decision. I accept, too, that the reasoning advanced must not give rise to substantial doubt as to whether there was an error of law although such an adverse inference is not readily to be made.

76 In my judgment the Inspector explained in succinct but precise language why it was that he accepted the Third Defendant's case about housing shortfall. He explained, too, that as between the Second Defendant and the Third Defendant there was no objection in principle to the development of the appeal site for housing. The Inspector analysed the policy issues sufficiently to demonstrate that he had concluded that the development of the site accorded with the provisions of policy HSG6 of the Mole Valley Local Plan which was an extant development plan in this respect. It followed, inevitably, as I have said that arguments put forward by the Second Claimant to the effect that the proposed development was in breach of policy CS1 or CS2 of the Core Strategy and/or the supporting text to those policies were rejected. I do not consider that the reasoning provided by the Inspector demonstrated the real possibility of legal error or that it was so lacking in detail as to leave the Second Claimant in any doubt about why its case was being rejected on this issue.

77 It follows that I am not persuaded that the combination of points taken by Mr Harwood QC under this ground demonstrate any error of law.

Ground 3

78 This ground asserts that the Inspector acted unfairly when he refused to allow the First Claimant to cross-examine Mr Brimmer about issues relating to the risk of flooding at the appeal site. The First Defendant and Third Defendant resist this contention vigorously.

79 Mr Harwood QC does not submit that the First Claimant had a right to cross-examine Mr Brimmer. His submission is that fairness demanded that the First Claimant be afforded the opportunity to cross-examine given the way in which the issues relating to flood risk had emerged at the inquiry.

80 The Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000 (hereinafter referred to as “the Rules”) govern many procedural aspects of appeals against refusal or non-determination of planning applications. Rule 16 relates to the “procedure at inquiry”. So far as is relevant it provides:—

> “(1) Except as otherwise provided in the Rules, the inspector shall determine the procedure at an inquiry.
>
> (2) At the start of the inquiry the inspector shall identify what are, in his opinion, the main issues to be considered at the inquiry and any matters on which he requires further explanation from the persons entitled or permitted to appear.
>
> (3) Nothing in paragraph (2) shall preclude any person entitled or permitted to appear from referring to issues which they consider relevant to the consideration of the appeal but which were not issues identified by the inspector pursuant to that paragraph.
>
> (4) …. ***185***
>
> (5) A person entitled to appear at an inquiry shall be entitled to call evidence and the Appellant, the local planning authority and any statutory party shall be entitled to cross-examine persons giving evidence, but, subject to the foregoing and paragraphs (6)

and (9), the calling of evidence and the cross-examination of persons giving evidence shall otherwise be at the discretion of the inspector.

(6) The Inspector may refuse to permit the –

(a) giving or production of evidence;

(b) cross-examination of persons giving evidence; or

(c) presentation of any other matter which he considers to be irrelevant or repetitious; but where he refuses to permit the giving of oral evidence, the person wishing to give the evidence may submit to him any evidence or any other matter in writing before the close of the inquiry."

Rule 16(9) has no relevance in the circumstances of this case.

81 In *Bushell v Secretary of State for the Environment [1981] AC 75* objectors to a motorway scheme challenged a decision by the Secretary of State for the Environment to approve the scheme on the grounds, inter alia, that the Inspector at the preceding public inquiry had declined to allow objectors to cross-examine witnesses for the Department of Transport on the issue of the need for the scheme and the accuracy of traffic predictions. The claim for an order quashing the decision of the Secretary of State was dismissed at first instance but allowed in the Court of Appeal. The House of Lords allowed the Secretary of State's appeal and reinstated the order of the judge at first instance.

82 At the time of this decision there were no rules in force regulating the procedure to be adopted at the inquiry. The House of Lords held that in the absence of such rules the procedure to be followed was a matter of discretion for the Secretary of State and the Inspector. The only requirement was that the procedure had to be fair. During the course of his speech Lord Diplock expressed himself thus:—

"Proceedings at a local inquiry at which many parties wish to make representations without incurring the expense of legal representation and cannot attend the inquiry throughout its length ought to be as informal as is consistent with achieving those objectives. "Over-judicialising" the inquiry by insisting on observance of the procedures of a court of justice which professional lawyers alone are competent to operate effectively in the interests of their client will not be fair. It would, in my view, be quite fallacious to suppose that at any inquiry of this kind the only fair way of ascertaining matters of fact and expert opinion is by oral testimony of witnesses who are subject to cross-examination on behalf of parties who disagree with what they have said. Such procedure is peculiar to litigation conducted in courts that follow the common law system of procedure; it plays no part in the procedure of courts of justice under legal systems based upon civil law, including the majority of our fellow Member States of the European Community; even in our own Admiralty Court it is not availed of for the purpose of ascertaining expert opinion on questions of navigation – the judge acquires information about this by private inquiry from assessors who are not subject to ***186*** cross-examination by the parties. So refusal by an Inspector to allow a party to cross-examine orally at a local inquiry a person who has made statements of fact or has expressed expert opinions is not unfair per se.

Whether fairness requires an Inspector to permit a person who has made statements on matters of fact or opinion, whether expert or otherwise, to be cross-examined by a party to the inquiry who wishes to dispute a particular statement must depend on all the circumstances. In the instant case, the question arises in connection with expert opinion upon a technical matter. Here the relevant circumstances in considering whether fairness requires that cross-examination should be allowed include the nature of the topic upon which the opinion is expressed, the qualifications of the maker of the statement to deal with that topic, the forensic competence of the proposed examiner, and, most important, the Inspector's own views as to whether the likelihood of the cross-examination will enable

> him to make a report which will be more useful to the Minister in reaching his decision than it would otherwise be is sufficient to justify any expense and inconvenience to other parties to the inquiry which would be caused by any resulting prolongation of it."

83 In his speech Viscount Dilhorne expressed the view that an Inspector at an inquiry has a wide discretion as to his conduct and that he was entitled properly to disallow a particular line of cross-examination if it was not likely to serve any useful purpose. Lord Lane expressed a similar view and Lord Fraser expressly agreed with Lord Diplock, Viscount Dilhorne and Lord Lane.

84 In my judgment the reasons given orally by the Inspector on the last day of the Inquiry amply justified his decision to refuse to permit cross-examination by the First Claimant on the issue of the risk of flooding. Although that issue was of obvious interest to the First Claimant and although she believed that the risk of flooding was being underplayed this risk had never been relied upon by the Second Defendant either prior to the inquiry or at the inquiry. Further, the consultees with expertise on the subject did not recommend that planning permission be refused on account of the risk of flooding. In my judgment the Inspector was entitled to proceed on the basis that the issue of risk of flooding was not likely to be a determining issue in the appeal and that cross-examination by the First Claimant might cause an unnecessary prolongation of the inquiry. It is worth stressing that by the time the Inspector made his decision to refuse cross-examination he had heard the First Claimant's evidence and such cross-examination of her as had occurred. He had received a written response on the issue of flood risk. He was aware of all the statutory responses on this issue. He was peculiarly well placed to make a decision about the need for cross-examination.

85 The decision in *Bushell* was made at a time when there were no rules governing the procedure to be adopted. As I have said the public inquiry in this case was governed by the Rules made in 2000. Rule 16(1) makes it clear that the Inspector shall determine the procedure to be adopted at the inquiry and Rule 16(5) confers a discretion upon the Inspector as to whether or not to permit cross-examination. No part of r.16 was infringed by the Inspector's decision in this case.

86 Mr Harwood QC relies upon the decision of Sir Douglas Franks (sitting as a Deputy Judge) in *Nicholson v Secretary of State for Energy and Another [1978] 76 LGR 693* . In that case the National Coal Board had applied to the Secretary of State for Energy for an authorisation to start open cast coal mining on a site in ***187** Yorkshire. One of the objectors, the Applicant Mr Nicholson, lived near the proposed site. The Inspector at a local public inquiry permitted the Applicant to cross-examine one of the witnesses for the National Coal Board but he refused to allow him to cross-examine four witnesses who had given evidence on behalf of three local authorities who supported the case for the National Coal Board. The Inspector's reason for refusing cross-examination was that he feared that the questions which the Claimant intended to put would be repetitious or irrelevant. The Secretary of State for Energy granted the necessary authorisation but Sir Douglas Frank quashed the Secretary of State's decision.

87 The crucial passage from the judgment of Sir Douglas Frank is as follows:—

> "It used to be commonly thought that the purpose of a local inquiry was to enable local residents and organisations to "blow off steam", but that no longer is the case, for persons and bodies opposed to a project now expect to take an active, intelligent and informed part in the decision-making process. If that expectation is denied, a sense of grievance results and public opinion is affronted. In my judgment it should be a primary of an Inspector holding an inquiry to ensure that nobody leaves the inquiry with a reasonable cause of dissatisfaction, although I recognise that there are some people who can never be satisfied. All those matters, of which I take judicial notice, lead me to the conclusion that a reasonable person viewing the matter objectively would consider that there was risk that injustice or unfairness would result if a person considering himself to be directly injuriously affected by a proposal was denied cross-examination of a witness who had given evidence contrary to his case…..
>
> The Applicant here was denied cross-examination not because he proposed to put irrelevant or repetitive questions, but because the Inspector feared that he might do so, and because the Inspector apparently considered that the Applicant's own evidence would

> be a substitute for cross-examination. I accept that cross-examination must not be used for the purpose of a "fishing expedition", that is to say, the objector's purpose must not be to use the witness as one of his own witnesses for giving what amounts to evidence in chief. However, in this case the senior officers of the planning departments of the first two named authorities gave evidence to support the application and the Inspector clearly attached great importance to that evidence….
>
> No planning evidence was led by the Coal Board, so in effect the planning evidence for them was given by the planning officers, some of whom the Applicant wished to cross-examine. …therefore the evidence given by those officers was not only contrary to the Applicant's case but went to the very root of it and to the Inspector's recommendation (accepted by the Secretary of State) that the environmental damage which would arise from the workings was not sufficient to outweigh the need for the coal. It follows that the Applicant was denied the right to challenge by cross-examination the very evidence upon which his own case turned."

88 In my judgment there are a number of significant differences between the circumstances pertaining in *Nicholson* and the circumstances in the present case. First, the proposal for open cast mining was likely to have a significant and injurious effect upon the Claimant's personal interests. Second, balancing the effect of the proposal on the interests of persons such as the Claimant against the need to extract ***188*** coal was at the heart of what the Inspector had to decide. Third, the evidence which the Claimant wished to test by cross-examination was very important to the Inspector's decision.

89 In my judgment, the decision in *Nicholson* was very much dependent upon the circumstances prevailing in that case. Indeed, as *Bushell* itself makes clear, what fairness demands in any given case is fact sensitive. To repeat, in the circumstances prevailing in this case I do not consider that the Inspector acted unfairly by refusing to permit the First Claimant to cross-examine Mr Brimmer.

Ground 4

90 Paragraphs 115 and 116 of the National Planning Policy Framework (NPPF) provide:—

> "115. Great weight should be given to conserving landscape and scenic beauty in national parks, the Broads and areas of outstanding natural beauty, which have the highest status of protection in relation to landscape and scenic beauty. The conservation of wildlife and cultural heritage are important considerations in all these areas, and should be given great weight in national parks and the Broads.
>
> 116. Planning permission should be refused for major developments in these designated areas except in exceptional circumstances where it can be demonstrated they are in the public interest….consideration of such applications should include an assessment of:
>
> "• The need for the development, including in terms of any national consideration, the impact of permitting it, or refusing it, upon the local economy;
>
> • The cost of, and scope for, developing elsewhere outside the designated area, or meeting the need for it in some other way;
>
> • Any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated.""

The NPPF does not define or seek to illustrate the meaning of the phrase "major developments". Mr Harwood QC points out that in the Town and Country Planning (Development Management Procedure) Order 2010 art.2 defines major development as development involving any one or more of the following:—

> "(a) the winning and working of minerals or the use of land for mineral-working deposits;

(b) waste development;

(c) the provision of dwelling-houses where –

(i) the number of dwelling-houses to be provided is 10 or more; or

(ii) the development is to be carried out on a site having an area of 0.5 hectares or more and it is not known whether the development falls within sub-paragraph (c)(i);

(d) the provision of a building or buildings where the floor space to be created by the development is 1,000 square metres or more; or

(e) development carried out on a site having an area of 1 hectare or more." ***189**

91 Mr Harwood QC points out, too, that this definition appears or is incorporated into other regulatory provisions. That being so, he submits that the term "major development" should be given the same meaning wherever it appears in regulations or planning policy documents and, consequently, the proposal to erect 14 dwelling-houses upon the appeal site constituted major development.

92 The Inspector declined to treat the application before him as major development. His view was that the development of 14 dwellings could not properly be described as major "by any published or even commonsense criterion" – see para.39 of the decision letter.

93 Despite Mr Harwood's persuasive submissions I do not accept that the phrase "major development" should have a uniform meaning wherever it may appear in a policy document, procedural rule or Government guidance provided the context is town and country planning and, I presume, no contrary meaning is provided in the policy document, rule or guidance. Rather, it seems to me much more appropriate that the term should be construed in the context of the document in which it appears. In my judgment the context of the NPPF and paras 115 and 116 in particular militate against the precise definition which Mr Harwood QC suggests should attach to the phrase "major development". The word major has a natural meaning in the English language albeit not one that is precise. In my judgment to define "major development" as precisely as suggested by Mr Harwood QC would mean that the phrase has an artificiality which would not be appropriate in the context of national planning policy. As Mr Kolinsky points out in his skeleton argument the Regulations in which the phrase major development is defined are procedural in nature as is the guidance contained within which is also relied upon by Mr Harwood QC–a point with which Mr Harwood QC did not disagree. I do not consider it appropriate to import a definition which may be sensible and desirable in Regulations or guidance concerned with procedural matters into a document intended to form a detailed policy framework.

94 I am satisfied that the Inspector made no error of law when he determined that the meaning of the phrase major development was that which would be understood from the normal usage of those words. Given the normal meaning to be given to the phrase the Inspector was entitled to conclude that the Third Defendant's application to erect 14 dwelling-houses on the appeal site did not constitute an application for major development.

Conclusion

95 It follows from my decisions in relation to each of the four grounds of challenge that this claim must be dismissed. ***190**

Janet Briscoe, Solicitor.