ST ALBANS CITY AND DISTRICT COUNCIL LOCAL PLAN EXAMINATION

Stage 1 Matters, Issues and Questions

Hearing Statement on Matter 1

On behalf of

Helioslough Ltd

Representor ID: 1182085

Contents

Matter 1: Sustainability Appraisal

1. This document addresses Matter 1 Questions 1 – 5, 11, 12 and 17.

2. To avoid duplication in its answers and in its responses to various hearing matters, Helioslough has also provided a "Core Note" ("CN") as a generic appendix to all its hearing statements which provides the essential framework within which the specific answers are given and to which reference is given where appropriate below by **[CN/paragraph number]**.

3. These answers proceed from the Core Note – and it is assumed that the Core Note has been read first.

4. Attached to the Core Note is a paginated "Core Bundle" of material common to all the Stage 1 matters to which reference is made in the individual hearing statements by **[A/page number].**

5. The "Site" is the former airfield at Radlett; the "SRFI" is the Strategic Rail Freight Interchange approved the Secretary of State ("the SoS") in 2014 ("the 2014 Decision"). OAHN is "objectively assessed housing need". The "PSGV" is the Park Street Garden Village.

Q1c: ***Is the Plan compliant with the 2004 Act and the 2012 Regulations***

6. No.

7. In identifying the strategic priorities under s.19(1B) and the policies to give effect to them (s.19(1C)), SADC did not have regard to the NPS addressing SRFIs or the NPPF1042/c; 20b, 25-26 as required by s.19(2)(a). The clear policy support for SRFIs and the requirement for the Plan to facilitate them when needed here have not been taken into account at the stage of formulating strategic priorities. Had it been, SADC could not have done other than allocate the Site for the SRFI. By bypassing this stage, it wrongly treated the Site as potentially available for housing leading to S6(xi). **See CN/7; 10; 31b**.

8. In formulating its development plan policies to secure the s.19(1A) climate change objective, SADC was required to, but failed to, take into account: (1) the NPPF and NPS which highlight the role SRFIs play – s.19(2)(a); and (2) the necessarily material conclusions (as in the 2014 Decision) as to the contributions the SRFI here would make. Thus, its policy framework to meet the s.19(1A) objective has been formulated on a flawed and unlawful basis. This may also be considered under Q12.

Q2: ***Are the likely environmental, social and economic effects of the Plan adequately and accurately assessed in the Sustainability Appraisal (SA)?***

Q3: ***Does the SA test the Plan against all reasonable alternatives?***

9. No – to both questions. In relation to the Site the two questions are linked.

10. The Sustainability Appraisal wrongly: (1) fails to address reasonable alternatives (namely allocating the Site for an SRFI and meeting the OAHN elsewhere); and (2) omits consideration of the key disadvantage of allocating the Site for housing (namely the loss of the nationally significant SRFI and all its sustainability advantages) and the key advantage of allocating other sites for housing so far omitted (namely meeting OAHN *and* by doing so allowing the SRFI with all its advantages to be delivered). As explained at [CN/36; and Appx 3] the result is that the SA is flawed and its conclusions as regards the Site (and the other omitted sites) cannot be relied on.

11. Given the 2014 Decision, the necessary starting point [CN/20-22] is that there is a "compelling need" [CN/9; 11-19] to deliver the SRFI at the Site (especially given the lack of alternative locations for it); and a need to meet the OAHN within SADC's area. The former can only be met at the Site; the latter can be met elsewhere – SRFIs have exacting locational requirements, housing needs are more footloose. An allocation for PSGV would necessarily mean the compelling need for a nationally significant SRFI in the north west sector to meet the needs of London and the South East would not be met. That basic point should have been at the heart of the Sustainability Appraisal from the outset but has been ignored.

12. A central premise of the NPS and NPPF framework [CN/9 - 11] for SRFIs is the sustainability advantages of them [NPS para 2.40/2.51]. Those advantages drive the policy and drove the 2014 Decision. All those

advantages are necessarily material to the SA. All would be lost and that loss has been ignored and its significance not addressed in the SA.

13. In choosing this Site over NER (and other sites) the key advantage of those sites over this Site – namely that they do not frustrate but facilitate the delivery of the SRFI here – has been ignored.

14. Had the Sustainability Assessment addressed the correct question in the light of the NPS/NPPF/the 2014 Decision and the sustainability issues which drive their support for the SRFIs, it would necessarily have come to a different conclusion.

15. Further, the SA ignores:

    a. the loss of the 3400 full time jobs and a further 500 jobs related to the SRFI even though it purports to address economic impacts;

    b. the loss of most of the 334ha country park and all the associated benefits[1] secured with the SRFI even though it purports to address open space impacts and places weight on the delivery of a much smaller country park alongside the housing allocation.

Q4: ***Have any concerns been raised about the SA?***

16. Yes. The SA has been shown to be flawed in Helioslough's objections both on the site specifics and on the overall approach in so far as it affects other housing releases as alternatives to the housing at the Site.

17. As to the site specifics, see above. The original SA (para 4.5) recognised that the grant of planning permissions would mean that certain sites could no longer be considered as reasonable alternatives. Yet when it comes to this Site and the SRFI the Addendum SA Chp 4 March 2019 states that: "*the view of the Council is that the SRFI is not a 'reasonable alternative' for that site and therefore it was not assessed in the SA. However, for purposes of completeness the principle of developing an SRFI on the same site as that allocated for PSGV has now been assessed as part of this SA Report Addendum*". This approach is misconceived and demonstrates the underlying flaw in SADC's approach to this Site.

18. The SRFI is by definition a reasonable alternative because it has been granted planning permission by the SoS to meet a compelling need which can only be met here. This basic flaw has impacted the SA and plan preparation from 2017 and permeates the whole process: CN/Appx 2. Had SADC recognised the importance of the SRFI rather than being determined to frustrate it, it would necessarily have reached the conclusion that the SRFI was a reasonable alternative and that by virtue of it PSGV was not an option. The SA and policy formulation are required to be an iterative process evolving in tandem with each other. Here the SRFI as a reasonable alternative was only considered as an afterthought in the SA at the end of the process rather than informing the policy evolution from the outset.

19. In any event, SADC should have treated the SRFI and its benefits from the outset as the baseline against which to make comparative judgement as between sites and reasonable alternatives. Had it done so, the consideration of reasonable alternatives would have been wholly different because the loss of all the sustainability advantages of the SRFI would have made it impossible to justify the PSGV allocation here. This issue was raised in the Regulation 19 consultation held in October 2018 but was only retrospectively assessed in a misconceived and partial retrofitting exercise seeking to justify the *fait accompli* in the March 2019 SA addendum.

20. Whilst the case for all the other strategic allocations is well made and justified through the historic processes, the *inclusion* of this Site rather than its historic *exclusion* requires consideration of alternative strategies including, in particular, release of smaller scale Green Belt releases consistent with the spatial

[1] New and improved public rights of way within a wider strategic framework;80 ha of new species rich woodland planting; 162 ha of conservation grazing; Extensive new habitats for wildlife; Ecological management of the rivers Ver and Colne; Provision of a visitor and interpretation centre; New and improved targeted facilities for bird watching, fishing and horse related activities; Provision of various informal recreation facilities including nature trails, trim trails, apiary and circular running trails.

hierarchy (depending on site specifics, local infrastructure and contribution to Green Belt purposes). A generic - big is necessarily best assumption - which limits the consideration of other reasonable alternatives, is flawed. It is not disputed that *following* a proper sustainability appraisal, on the facts of a particular site, it could be concluded that a large allocation is preferable to several smaller ones because of the s.106 package it can deliver but it is not axiomatically so and it is misconceived to self-constrain the analysis by that assumption from the outset. On the facts of this Site, and this Site alone, that restricted approach has driven the allocation.

Q5: *Has the Council complied with s.19(5)?*

21. In respect of the Site, no. A partial SA has been provided but it is not a proper SA in so far as its approach to the Site (and alternatives to it).

Q11: *Are there any policies in the strategic section of the Plan that should be in the non-strategic section?*

22. No. However, the reverse is the case. Under NPPF20b the strategic policies are required to include those to make sufficient provision to meet objectively assessed needs for other uses. The need for SRFIs has been conclusively assessed through the 2014 Decision. A strategic policy re: the SRFI is required.

Q12: *Climate change policies*

23. No. See para 6 above. The SRFI is expected to bring about very large reductions in the emissions of the most important greenhouse gas, carbon dioxide, across the wider transport network, by transferring freight from road to rail. This is a key part of the rationale for the policy support for them. Allocating land for housing such as to frustrate delivery of the SRFI is, given the lack of any alternative, inconsistent with s.19(1A) because it means that large swathes of London will remain excessively dependent on HGV road movements. Because the Plan fails to address those issues and because S6(xi) requires those advantages to be lost, this part of the Plan does not do what s.19(1A) requires.

24. Further, S6 (xi) purports to deliver a sustainable garden village consistent with s.19(1A). However, there is no transparent transport assessment, the site is relatively isolated from the services its residents will need and will be likely to be car dominated, hence the policy requirement for the rail improvements. There can be no confidence that those improvements fundamental to the acceptability of the allocation and its delivery can be delivered: CN/40.

Q17: *Main Modifications*

25. The List requested should include:

    a. Draft Policy S6 (xi) “Park Street Garden Village” and all references to PSGV should be removed.

    b. Additional housing sites should be identified – there are ample omission sites before the Inspectors which can and should be the subject of main mods.

    c. The site should be identified for an SRFI under a strategic policy. A new policy in ‘Chapter 4 - Infrastructure and Community Facilities’ should set out offering support for the SRFI at the Former Radlett Aerodrome site in the following terms:

        Objective: To provide a new Strategic Rail Freight Interchange, Park Street/Frogmore bypass, and a Country Park.

        Proposals: The development is expected to deliver:

        - *A Strategic Rail Freight Interchange (SRFI) comprising an intermodal terminal and rail and road served distribution units;*

- *Country Park inclusive of a Visitor Centre, new and improved public rights of way, community forest and ecological enhancements on land within and around the SRFI site;*
- *A Park Street/ Frogmore Bypass and improvements to the surrounding highway network as necessary including at Park Street roundabout and London Colney roundabout.*

Appendices to Hearing Statement Matter 1 - Index

FORMER AIRFIELD, RADLETT – SRFI OR HOUSING ALLOCATION

CORE NOTE "CN"

(Generic appendix to all hearing statements of Helioslough Limited)

1. This document sets out Helioslough's core case in objecting to St Albans City and District Council's ("SADC") proposed housing allocation of land at the Former Aerodrome, Radlett ("the Site") for Park Street Garden Village ("PSGV") and the failure to allocate the land for the strategic rail freight interchange ("SRFI") granted permission by the Secretary of State ("the SoS") in 2014 ("the 2014 Decision"). It provides the framework within which all the Stage 1 Matters are addressed in the accompanying individual hearing statements. Accompanying the Core Note is a paginated bundle of material common to all the Stage 1 matters (references to which are given as "[A/page number]"). This bundle has been kept as small as possible and only key extracts provided - the full documents are available on request[1]. Agreement will be sought with SADC as to the factual accuracy of the attached chronology and materials.

2. In short summary, Helioslough's case is that the proposed allocation of the Site[2] in the Local Plan ("the Plan") for PSGV is unlawful and unsound and must therefore fail for each of the following reasons:

    a. there is a compelling need for a nationally significant SRFI to serve London and the South East in the north west sector which need can only be met at the Site. NPPF104c/e [A/36] and NPPF20b [A/32] directly apply and there is no factual, legal or planning justification for not complying with them;

    b. given the findings of the SoS in the 2014 Decision, the delivery of an SRFI here necessarily constitutes a strategic priority under s.19(1B) of the Planning and Compulsory Purchase Act 2004 [A/4] and SADC must therefore have policies to address it (s.19(1C)) but has (inexplicably) failed to do so;

    c. it is unsound, unlawful and unreasonable for SADC to have as a major element of its Plan a housing allocation (S6(xi)) which has the effect of (and/or is for the purpose of) defeating delivery of approved nationally significant infrastructure for which there is a compelling need and which can only be located here;

    d. SADC sets up a false choice between meeting its objectively assessed housing need ("OAHN") and meeting the national need for an SRFI here. It is required to meet both, a proper planning approach would be to do so and there is no

[1] A hard copy of Helioslough's extremely extensive historic bundle on Radlett will be available at the hearings should any more detailed information be required.

[2] Helioslough makes no objection or comment on any other large scale allocations or the process or Sustainability Appraisal in respect of those large scale allocations.

reason why it cannot do so – but SADC has made a choice to only meet *its* OAHN and not the compelling national need for an SRFI here;

e. its approach to, and reasons for rejecting other housing sites to deliver the OAHN, are misconceived in principle, unjustified on the merits and internally inconsistent and illogical;

f. in making the choice between an SRFI and housing on the Site, SADC has misdirected itself in law and on policy; has made unsound planning judgements and undertaken the comparison of advantages and disadvantages in a misconceived way in particular ignoring the wide-ranging benefits of delivery of an SRFI here and the disadvantages of failing to deliver it;

g. the Sustainability Appraisal is flawed in respect of the Site (and other omitted housing sites especially North East Redbourn – "NER") because it failed from the outset to address the central issues – namely:

    i. the disadvantages of housing at the Site given that housing here prevents delivery of the nationally significant SRFI to serve London and the South East; and

    ii. the advantages of housing on omitted sites by meeting the OAHN and allowing delivery of the SRFI thus avoiding the "false choice" referred to above; and

h. in any event, the PSGV allocation here is unsound and undeliverable.

3. SADC appears to have accepted the force of many of these points in its Re-Evaluations (the first time the SRFI was considered in the process) but has ploughed on regardless.

4. Further, whilst the above points are individually amply sufficient to require the removal of the allocation, it appears to Helioslough that the PSGV allocation is an attempt to defeat the SRFI and avoid the consequences of the 2014 Decision and thus unlawful on that basis also. SADC cannot use its plan making powers for the purpose of defeating the 2014 Decision of the SoS.

5. The permission for the SRFI has been implemented[3] and, absent the proposed allocation, there is no significant impediment to delivery. A site plan is at [A/1].

6. S6(xi) and all references to PSGV should be deleted. There are ample appropriate sites to allow the full OAHN to be met via an early review of the plan or main modifications[4].

[3] This is not understood to be controversial and so is not considered further here. If SADC disputes implementation, Helioslough has a complete pack of material which demonstrates compliance with all conditions precedent and the s106 and the carrying out of relevant works which can be provided.

[4] Even if this is not possible, or there is a shortfall, there is ample time for any shortfall to be rectified in an early review of the Plan given that PSGV was not anticipated to start delivery of housing until at least 2026.

There is no need for the Plan to be withdrawn. A strategic policy to support and facilitate the delivery of the SRFI here should be included.

Statutory requirements

7. So far as relevant, s.19 [A/2] requires:

    a. the development plan to identify strategic priorities for the development of land in the area (s.19(1B)) and have policies to address those priorities;

    b. the LPA to have regard to national policies (s.19(2)(a)) in formulating their plan and their strategic priorities; and

    c. a sustainability appraisal to be prepared (s.19(5)).

8. Reference is also made below to the duty to co-operate (s.33A) [A/4]. It is submitted that both: (1) the provision of an SRFI to meet the needs of London and the south east; and (2) cross boundary housing sites are strategic matters under s.33A(4). Even if this is not correct, the obligations of collaboration under the NPPF are triggered.

Policy

9. The NPS on National Networks 2014 ("the NPS") addresses SRFIs at para 2.42ff [A/21]. It confirms long standing policy [para 2.11[5]) that there is a "compelling need" for an expanded network of SRFIs (para 2.56[6]). The status quo is not acceptable (para 2.57 - 2.58[7]). The NPS notes the limited number of suitable locations for SRFIs and the particular difficulties in provision to serve London and the South East (para 2.58).

10. As to the NPPF:

    a. NPPF104e [A/36] provides that planning policies "*should provide for any [SRFIs] that need to be located in the area"* taking into account the NPS for nationally significant infrastructure projects ("NSIPs"). SADC correctly accepts that the SRFI at Radlett is to be treated as an NSIP [A/159 under Section 4]. In the light of the 2014 Decision [A/50 @ [53]], the SRFI "needs to be located" here.

    b. NPPF104c requires planning policies to "*identify and protect, where there is robust evidence, sites and routes which could be critical*" in developing relevant infrastructure – in the light of the 2014 Decision there is such robust evidence here.

    c. NPPF20(b) [A/32] requires that "*strategic policies*" should make sufficient provision for transport infrastructure in accordance with NPPF11 (objectively

[5] going back to at least 2001.
[6] see also paras 2.1 [A/17], 2.2, 2.8, 2.10, 2.58 as correctly interpreted in Colnbrook at IR12.89 [A/91]and DL24 [A/84]
[7] As accepted by the SoS in the Colnbrook DL @ [25] [A/84]

assessed needs not just for housing): [A/30]. The 2014 Decision makes clear that that includes an SRFI here.

d. The NPPF2019 framework is a significant strengthening of the approach to SRFIs in NPPF2012 (see para 162 and just "take account of the need" and para 182 just "seeks to meet") under which the publication draft LP was prepared.

e. NPPF25/26 [A/33] requires SADC to work with other strategic planning authorities and infrastructure providers to determine where additional infrastructure is necessary. There has been no work by SADC to determine where, if not at the Site, an SRFI can be provided. The 2014 Decision provides the answer to where additional infrastructure is necessary – namely at the Site. The question posed by NPPF25/26 has been conclusively answered.

SRFIs

11. SRFIs are (now[8]) *nationally significant* infrastructure and are required to meet the national need for an enhanced network. They have **extremely exacting locational requirements** – very large[9], unfragmented, flat sites close to the strategic rail freight and road networks and the conurbations they serve (NPS para 2.45 [A/21]). These requirements are far more onerous than for any site to meet housing needs. As a result, it has proved "**extremely problematic**" (Radlett DL @ para 31 [A/46]) to find sites for them especially in the south east as confirmed in the NPS2.58.

The SRFI at Radlett

12. The proposal for the SRFI is shown in the masterplan at [A/2]. It includes the construction of an intermodal terminal and rail and road served distribution units (331,665m2 in Use Class B8 including ancillary B1/B2 floorspace) within the central area labelled 1; with associated road and rail and other infrastructure facilities and works within Areas 1 and 2 (including earth mounds and a Park Street/Frogmore relief road) in a landscape setting and further landscaping and other works within Areas 3 to 8 inclusive to provide public accessible open land and community forest.

13. The Country Park ("CP") proposed as part of the SRFI includes the parcels of land numbered from 3 to 8 in **A/2**. The main road access to the SRFI (or any housing development) would be from the A414 to the north on land owned by the Gorhambury Estate. Whilst HCC owns a small part of the site frontage in proximity of the Midland Main Line bridge that land could not be used for access purposes due to its proximity with the junction of the A414 with the B5378.

[8] They were not at the time of the application leading to the 2014 Decision – but see now s.26 of the 2008 Act and art 4B of SI2010/101 as accepted by SADC at [A/159 last para].
[9] 60ha

The background to and reasons for the 2014 Permission

14. After an extremely detailed, highly contentious and protracted process over many years (see Appendix 1[10]) in which SADC played a full part and which the question of alternative sites to meet the need was a central issue, the SoS made the 2014 Decision.

15. He attached "very considerable weight": DL53 [A/50] to the need for SRFIs to serve London and the south east, concluded that the appropriate area of search was the north west sector [DL34] and that there were no more appropriate locations for an SRFI to meet the need within that sector. He thus found that there were very special circumstances justifying the grant. A High Court challenge to the 2014 Decision by SADC failed**.**

16. At every stage of the process SADC fought extremely rigorously using every opportunity available to it to defeat the SRFI: see Appendix for the headline points.

17. Throughout that process SADC relied extensively on an alternative site for an SRFI at Colnbrook. The Inspector found that it could not rationally be concluded that Colnbrook met the needs for an SRFI in a less harmful way than Radlett [A/74: para 13.103] and, following a High Court judgment concerning the approach to that issue, the SoS agreed: DL39 [A/48]. An appeal in respect of an SRFI at Colnbrook has since been refused: [A/80]. On the Colnbrook appeal, the SoS assumed Radlett would proceed [Colnbrook DL26].

18. There have been no other relevant proposals, applications, allocations or permissions for SRFIs to serve the north west sector and, save for progress at the Site, no progress in meeting the "compelling need" elsewhere since 2001. As to the rest of London, a renewal application at Howbury was refused in 2019 [A/105].

19. Through this local plan process, SADC has (correctly) not suggested that: (1) the compelling need no longer exists; (2) there is any suitable alternative location for an SRFI in the north west sector; or (3) that the need can be met in some other way perhaps through joint working with other authorities (NPPF footnote 42). SADC purports to "fully acknowledge" the need and the lack of alternatives. There has been no collaborative work with infrastructure providers to secure the necessary SRFI elsewhere.

[10] Appendix 1 sets out the Chronology of applications, appeals and statutory challenges from 2006 – 2017. This has been an exceptionally prolonged planning dispute during which SADC has had ample and repeated opportunities over many years to oppose the SRFI and to set out why an SRFI should not be provided here.

Necessary starting point for local plan preparation

20. Whilst the findings of the SoS on the 2014 Decision may not be *strictly* legally binding on SADC in formulating its local plan (*R(Evans) v. Attorney General)* [2015] UKSC 21 @ para 66 [A/118] and *R(Stonegate) v Horsham DC [2016] EWHC 2512; [2017] Env LR 8 @* para 66 [A/131] this case has all the relevant features which indicate that SADC is unlikely to be able to point to any rational basis for departing from them:

    a. they were reached after full examination in formal inquiry including significant testing in cross-examination *by SADC*;

    b. those conclusions were subsequently strengthened by the conclusions of the SoS at Colnbrook;

    c. they were reached by the SoS at the apex of the planning system in the light of all the evidence and his policy on SRFIs. The same policy (s.19(2)) and factual matters (NPPF104e/c and NPPF20b) are necessarily material to the formulation of the local plan – indeed the position has been strengthened by changes in the NPPF and the NPS; and

    d. there is no suggestion that anything material has changed since re: SRFIs.

21. There is thus no possible (or claimed) lawful or rational basis (*Mayor of London v Enfield [2008] Env LR 33] @* paras 1 and 29 **[A/136]** for SADC to proceed in its local plan preparation other than on the basis that:

    a. this nationally significant infrastructure "needs to be located" here (NPPF104e);

    b. there is "robust evidence" as accepted by the SoS that this site needs to be protected for an SRFI (NPPF104c);

    c. an SRFI here is necessarily a "strategic priority" (s.19(1B)) and strategic policies are necessary to make sufficient provision for it here (NPPF20b); and/or

    d. the "compelling need" (NPS 2.56) can only be met here;

    e. "additional infrastructure" [NPPF/26] is "necessary" here; and therefore

    f. there is a compelling need for a nationally significant SRFI to be located at the Site. Network Rail's representations to this Examination confirm that position: [A/422].

22. Had that necessary starting point been adopted, it is inconceivable that SADC could rationally have chosen to allocate the Site for PSGV. In the light of it, there is no sound or rational basis for the PSGV allocation.

SRFI Deliverable

23. The Radlett permission has been implemented. Helioslough has exclusive options over the northern access land. It has made major progress with Network Rail to secure detailed sign off through its GRIP process. Once this allocation is deleted there is no reason to suppose that it will not secure the other land required from Tarmac and HCC.

24. As to HCC as landowner, HCC is awaiting the outcome of this Local Plan land allocation process before deciding whether to sell its land holding for the SRFI. Absent a housing allocation it has been repeatedly advised by its own Queen's Counsel that it would have no legal choice but to sell for the SRFI. For the latest public Advice see [A/197][11].

The unlawful and unsound approach of SADC

25. The evolution of the local plan and its approach to this Site is considered in **Appendix 2**. It shows that save for the belated "Re-Evaluations" [A/152; and A/175]– which are considered below - through the whole process from 2017, SADC was (inexplicably) silent on SRFIs (despite the 2014 Decision, NPPF20/25/26/104; NPS2.56).

26. In assessing sites to meet the OAHN and in formulating the indicative publication draft, there was no explicit consideration whatsoever of the implications for the SRFI, the NPS; NPPF104; 20, 25-26 or the sustainability implications of not delivering the SRFI.

27. Very belatedly, SADC sought to fill that hole in the justification for its proposed allocation of the Site through the Re-Evaluations. They appear to proceed on the basis that SADC had a choice to make between competing priorities – housing and SRFI – it could only have one not both [A/167 top three paras].

28. That approach is unsound – legally, factually and in policy terms. The Plan can and should meet the OAHN ***and*** the need for the SRFI ***not*** just one or the other. SADC has thus set up a **false choice**.

29. It is only because of setting up that false choice that SADC could have had any possible rational basis for departing from the 2014 Decision.

30. The adoption of that false choice means that the Plan in respect of the Site is unsound. Either the allocation for housing will be delivered in which case the compelling need for a nationally significant SRFI here will not be met; or the SRFI is built out and the Plan will not deliver the housing necessary for its OAHN. The only way to square this circle is to allocate this land for the SRFI and to undertake an early review of the plan or make main modifications to include other sites for housing.

[11] Just one of a suite of advices it has received on this issue.

31. S6(ix) is thus:

a. **unsound** under NPPF35 because (using the words from that paragraph appropriately adjusted) it is:

i. not positively prepared in that it fails to meet the objectively assessed need either for the SRFI or the housing and is not based on any alternative assessment as to where the need for an SRFI can be met;

ii. unjustified because: (1) it is not an appropriate strategy - any appropriate strategy would necessarily plan to deliver both OAHN and the SRFI; (2) there are no reasonable alternative means to meet the need for an SRFI and there are other reasonable alternative means to deliver the housing; and (3) the Plan is not based on a proportionate evidence base – the evidence base and in particular the conclusions of the SoS in the 2014 Decision all point in the opposite direction to a housing, rather than an SRFI, allocation here. Housing need can be met in a variety of ways - it is (relatively) footloose, the SRFI is not. The facts give rise to an inescapable conclusion that this site must be allocated for an SRFI; and/or

iii. inconsistent with national policy: see NPPF104; 20; 25-26; and 59-72; NPS 2.56 – 2.58. There is no requirement for the OAHN to be met here – but there is a requirement for the need for an SRFI to be met here. The strategic and site-specific policies are inconsistent with national policy;

b. **unlawful** because:

i. it does not identify provision of an SRFI as a strategic priority (s.19(1B)) or contain the required strategic policies (s.19(1C) and NPPF20b). In identifying the strategic priorities, SADC was required to, but did not, have regard to the NPPF and NPS in relation to SRFIs (s.19(2(a)). Had SADC considered the relevant policies correctly in formulating its strategic priorities it would have had no rational option other than to identify provision of an SRFI here as a strategic priority, allocate the site for the SRFI, and/or refuse to allocate it for housing;

ii. in *preparing* it, SADC has not taken into account the NPS and national policy on SRFIs contrary to s.19(2)(a) – the consideration of the SRFI in the "Re-Evaluations" was (as shown in appx 2) an after-thought when the housing allocation was a *fait accompli.* Even then, the belated "Re-evaluations" are a device to defeat the SRFI;

iii. SADC cannot rationally consider a site to be available for housing which is required for the SRFI. So far as Helioslough is aware, there has never

been a case in which a development plan allocates a site for a "footloose" use X when that site has a permission for, and is the only possible site for, a nationally significant development (use Y) for which there is a compelling need. The reason there are no examples is obvious – use X can be met elsewhere and must give way to use Y; and

iv. whilst Helioslough necessarily succeeds as a matter of law well before this point, on examination of the history from 2016 - 2018, it is clear that SADC housing allocation here is designed to frustrate (and has the direct effect of frustrating) the 2014 Decision and the delivery of the SRFI. By analogy with *R v. Warwickshire CC ex parte Powergen* [1998) 75 P&CR 89 [A/147], SADC cannot rationally use its plan making powers to frustrate the delivery of nationally significant infrastructure for which there is a compelling need and no alternative site.

Delivering housing and the SRFI – no inconsistency – both readily achievable

32. As confirmed by SADC in its Re-Evaluations [A/170: Alternative housing strategy], there is no reason why the OAHN and the need for an SRFI cannot both be met. There are sufficient sites (other than this Site) which could appropriately be released from the GB. Thus, the correct understanding here is that SADC has *decided* to (rather than been compelled to) make this an either/or choice.

33. Helioslough has no comment on the other strategic allocations – its concerns are only with the process leading to the proposed allocation of this Site.

34. The detail to support the following headlines is in **Appendix 3**:

    a. the reasons for rejecting the site at North East Redbourn ("**NER**") are misguided because:

        i. the starting point is that there is an "either/or" choice between NER and this Site for housing and that therefore it is a beauty parade between them. That is the wrong starting point – this Site is not available for housing;

        ii. they are based on a significant understatement of the policy position in favour of the SRFI and the harm caused by not delivering it at the Site and a significant overstatement of the problems with the delivery of housing at NER;

        iii. they ignore the key advantage of NER - namely that housing there would help meet the OAHN *whilst also* enabling an SRFI and all its major advantages in the national interest at the Site;

iv. whilst the first part of NER is smaller than Radlett, its allocation would leave around just 845 units to be met right at the end of the plan period (from 2032-33). There is scope for those units to be provided on the remainder of NER or other sites;

v. NER makes less contribution to the purposes of the Green Belt than the Site – if this was a beauty parade, NER should win; and

vi. the alleged benefits of housing at Radlett are significantly overstated and those at NER significantly understated,

b. the reasons for rejecting other sites are misconceived. By way of example only:

i. Smaller sites: SADC has rejected apparently all smaller scale additions to existing settlements irrespective as to the site-specific merits of such additions, the capacity of local infrastructure, the extent to which the sites serve Green Belt purposes and despite NPPF68. As demonstrated by its own Green Belt review, there is ample capacity for such releases through a Site Allocations document: see [Appx 3 para 1 – 3];

ii. Gaddesden Lane [Appx 3 para 7-9] has been assessed as making little or no contribution to most Green Belt purposes. There are no constraints to delivery of 339 units. It is an obviously suitable site for expansion of Redbourn utilising and contributing to local infrastructure. The site in total is of sufficient scale to be considered a strategic site (more than 14ha) but it straddles the boundary with Dacorum (with 13.2ha being in SADC's area). Without any explanation as to how the duty to co-operate has been pursued here for a classic cross-boundary issue, the site is rejected *just* on the basis that it is too small. It appears that there has been a clear failure to address the duty to co-operate in respect of this site;

iii. Windridge Farm [Appx 3 para 10 – 12]– the very large broad area of search was rejected in the GBR. This small part of it does not have similar impacts on the GB to the wider whole and, on SADC's logic, should have been tested against Radlett and NER;

iv. Carpenter's Nursery [App 3 para 13 – 14]- the site was considered as part of one of the larger Green Belt parcels rejected in the 2013 GBR, but it is located in proximity of the green-rated "Land North of St Albans" which extends further north in the Green Belt. HCC stated in the Call for Sites 2018 that there is the potential to accommodate up to 350 dwellings on site if 50% of the site is developed at 30 dwellings per hectare. This 50% could be concentrated on the western part of the site to retain the small gap between St Albans and Sandridge and

concentrate the urban expansion in proximity of the allocated "Land North of St Albans" site and the existing built-up area to the south.

v. Land West of Redbourn: [Appx 3 para 15] the site was not considered to "*significantly contribute to any of the five Green Belt purposes*" in the 2013 GBR but was subsequently removed from the pool of sites identified for development without appropriate justification. The site is deliverable and developable and could accommodate up to 240 new homes at a density of 40 dwellings per hectare.

c. In any event, Radlett is only projected (apparently highly optimistically - see below) to start to deliver housing in 2026. There is ample time for a plan review or a site allocation local plan to make further allocations if necessary.

Even if SADC had to make a choice, its choice is unsound

35. In the "Re-Evaluations", SADC attempts (retrospectively) to justify the choice it has made between the SRFI and housing. That choice is unsound and unlawful for reasons already addressed and for the basic reason that **housing is footloose** (not tied to a specific location) whilst SRFIs have extremely exacting locational requirements which make finding sites to meet the compelling need extremely problematic and the SRFI to serve this sector of London and the South East can only go here.

The Sustainability Appraisal is unsound and unlawful

36. The Sustainability Appraisal ("the SA") is flawed in respect of the Site (and the alternatives to it) for the following reasons:

a. the SRFI was an "existing significant permission" at all the relevant stages of the Local Plan preparation but SADC expressly did not consider it a "reasonable alternative". This is unreasonable as a matter of fact – by definition it is a reasonable alternative given that the SoS has given permission for it after an exceptionally prolonged process;
b. SADC should have taken into consideration the SRFI since the very early stages of the SA. Instead, they tried to remedy the inexplicable omission of the SRFI from the SA 2018 by providing a belated comparison between the SRFI and the PSGV in the SA Report Addendum March 2019. The SA Report Addendum March 2019 tried, without success, to remedy the fundamental structural and procedural flaw of the SA Report September 2018;
c. SADC stated that the presence of a granted planning permission disqualifies certain locations from being considered "reasonable alternatives" for future development (Chapter 4.5 SA Report September 2018) but, inconsistently with that, considered PSGV a "reasonable alternative" notwithstanding the SRFI planning permission for the same site;

d. in addition, the SA should have highlighted the sustainability credentials of the SRFI at the outset and treated that as the baseline for comparison purposes – because all the advantages which justified the 2014 Decision would be lost if it was allocated for housing and this is necessarily highly material to any valid or rational comparative analysis.

Allocation of Park Street Garden Village in any event not sound

37. *Available and Deliverable:* SADC assume [A/169/170] without any evidence or investigation that the PSGV's land is available and deliverable. It is not:

    a. the road access would have to be at the location shown at A/1. During the evolution of the SRFI proposals, HCC was entirely clear that moving that roundabout any further east (and thus avoiding the need to acquire the Gorhambury land) was not possible because of the railway bridge and the requisite visibility and merging distances. The PSGV is thus dependent on securing the Gorhambury land – but Helioslough has an exclusive option over it which it will not give up. PSGV cannot therefore be accessed;

    b. Helioslough has no intention of abandoning the SRFI. It will continue to seek to secure the land for the SRFI by all avenues open to it. There is no guarantee (and no evidence) that it will be available for housing.

    c. The SRFI permission has now been implemented.

38. *Feasibility of HCC's Masterplan*: The HCC's Regulation 19 representation [A/431] seeks to support the PSGV with a masterplanning exercise, but acknowledges that the site has major constraints for residential development and that the masterplan is a high-level exercise, is at a preliminary stage and lacks detail in key areas such as technical and environmental studies. Without that the deliverability and developability of the PSGV cannot be demonstrated. Instead of providing a clear framework for the PSGV, HCC's Regulation 19 representation is forced to admit the intrinsic weaknesses and limitations of the masterplan and, in turn, of the allocation. In particular, the Regulation 19 representation underlines the presence of the following "major site constraints" affecting the masterplan:

    - visibility issues across the site from the railway line;
    - the optimal location for access to the PSGV is in the same position as the proposed access to the SRFI, outside the ownership of HCC;
    - HCC's land adjacent to the A414 has visibility issues;
    - Noise levels from the A414 and M25 may influence the location and capacity of the site for any development;

- Maintaining tree belts and hedgerows necessary to contain any development on site

39. HCC's Regulation 19 representation concludes by noting that "*further technical and environmental studies would be required to verify and develop the masterplan to ensure the policy is deliverable and developable*" and, more importantly, that this work should be undertaken "***if*** *the SRFI planning consent is not, for whatever reason, implemented*". As discussed, the SRFI planning consent has now been implemented, so further work on any masterplan for the PSGV would be academic.

40. *Rail Improvements:* The allocation is predicated on, and dependent on, the delivery of the improvements to the Abbey Line. These improvements are speculative and unsupported by NR. HCC admitted in its Regulation 19 representation that a "major transport infrastructure study" is required to assess the "potential" of the improvements. There does not appear to have been any detailed feasibility study carried out in conjunction with Network Rail. Absent those improvements the core alleged benefit of PSGV will not be delivered and SADC's justification for its allocation evaporates.

41. *Road:* There is no evidential basis to have any confidence that the PSGV allocation can be delivered without severe consequences for the highway network in the locality.

42. *Schools:* there is no suggestion that PSGV is the only possible site for any required secondary school. It does not therefore justify the allocation.

43. *Real Interest?* The lack of any properly worked up or thought through scheme is telling. The serious lack of any real progress on proposals for housing and the formulation of a meaningful master plan, the huge hurdles to delivery and the very long timeframe assumed for first delivery (2026) suggest that the proposed allocation has not been properly thought through. This is a speculative allocation for the purpose of frustrating the SRFI.

The Result

44. The PSGV allocation (S6 (xi)) and all references to it (e.g. at S1) must be deleted. An allocation for an SRFI should be included. Any Plan which does not do so will be unlawful.

45. Alternative housing allocations can be secured through an early review of the Local Plan, Main Modifications to the Local Plan or a new site allocations Local Plan. There is no requirement for the Plan to be withdrawn. The issues raised here need not disrupt progress on the rest of the Plan.

Appendix 1: Chronology including history of Applications/Appeals at Radlett and Colnbrook

27/07/06	First Application for SRFI at Radlett ("PA1")
02/11/06	SADC refuse PA1 on multiple grounds
06/11/07	Inquiry into appeal on PA1 (26 days)
01/08/08	SoS refuses appeal on sole ground of flaws in alternative site assessment [DL58]
09/04/09	Second Application for SRFI at Radlett ("PA2") – identical to PA1 with new ASA
21/07/09	SADC refuse PA2 on substantially same grounds as PA1 despite SoS Decision on PA1
08/10/09	PIM - Inspector advises that re-running arguments when no material change of circumstances risked costs
24/11/09	Inquiry into appeal on PA2 opens (15 days)
19/3/10	Inspector's Report recommending permission be granted – Colnbrook could not rationally be considered a better alternative [IR13.103]. Costs award against SADC.
07/10/10	SoS refuses permission on the basis that it had not been demonstrated that Colnbrook was not a suitable alternative location in the north west sector [DL25]
July 2011	High Court quashes the 2010 Decision.
19/10/11	SoS seeks, and receives, first set of further representations (R1)[12]
29/11/11	SoS seeks, and receives, second set of further representations (R2)
29/03/12	SoS seeks, and receives, third set of further representations in response to NPPF12 (R3)
18/04/12	SoS seeks and receives fourth set of further representations (R4)
19/09/12	SoS considers re-opening Inquiry and receives representations from SADC supporting this (R5 and R6). SADC argue for conjoining reopened inquiry with Colnbrook on the basis that there is a choice between Radlett or Colnbrook for where the necessary SRFI will go
28/11/12	SADC resolves to undertake Green Belt Review

[12] The full rounds of correspondence are not provided but are available on request

14/12/12	SoS decides not to re-open Inquiry
21/12/12	SoS issues minded to grant letter (subject to s.106 agreement signed by HCC being received)
19/02/13	SoS seeks and receives seventh set of further representations (R7)
01/03/13	SADC seek to challenge by way of judicial review the refusal to re-open the Inquiry (refused permission by the High Court twice)
21/10/13	HCC report to committee considering entering into s.106 agreement and alternative uses of land
04/11/13ff	HCC receives Advice on entering in the necessary s.106 agreement. SADC makes representations to HCC re: entering into the s.106 agreement
Nov 13	Green Belt Review reports
9/12/13	HCC considers whether to enter s.106 and to sell land
Feb 2014	GBR Stage 2
14/07/14	**SoS grants permission – "2014 Decision"**
22/08/14	SADC challenge 2014 Decision
Sept 14	Local Plan draft for consultation
14/12/14	HCC considers alternatives to SRFI
13/5/15	High Court dismisses challenge to 2014 Decision, SADC seek permission to appeal and refused twice.
July 2015	Following completion of legal proceedings, Helioslough commences work on preparation of RMAs.
Oct 15	HCC/Segro meet on sale
10/11/15	Petition to HCC re: SRFI
14/12/15	HCC report – seeking to find alternatives uses for Site to avoid sale for SRFI
10/06/16	HCC receive Advice as to duty to sell
04/07/16	HCC report on expressions of interest for housing and duty to sell
17/07/16	SoS refuses Colnbrook appeal
2016	Publication draft LP
2016	Inspector finds failures under duty to co-operate

12/07/17	SADC fail to quash Inspector's conclusion on duty to co-operate
12/09/17	SADC PPC report on how to progress Local Plan and possible responses to higher OAHN
Sept 17	HCC submission to SHLAA Call for Sites raising PSGV
Oct 17	SADC PPC on potential approaches to OAHN
7/11/17	SADC approve Reg 18 Issues and Options and Call for sites

The chronology after this is well known to the Inspectors through the various reports to PPC and the various documents prepared by the Council in response to the Inspector's questions.

Documents to "prove" the above chronology are available on request but there should be no dispute on it and hence it has not been thought proportionate to provide them all at this stage.

Appendix 2: Evolution of the Local Plan

1. Until about 2017, the expected housing provision in this local plan was about 436 per annum.

2. In 2013 a high level Green Belt review had been carried out. The Green Belt in SADC's area was divided into strategic parcels to allow an assessment of the extent to which each contributed to openness and purposes of including land in the GB. Eight strategic sub-areas (within those strategic parcels) which contributed least to GB purposes were identified – the possible Broad Locations of Growth ("BLGs") - and 3 small scale sub – areas.

3. Neither the Site nor North East Redbourn ("NER") had been identified as possible BLGs. Of the other sites to which Helioslough make reference, Gaddesden Lane (SA/SS2) was identified as a small site contributing least to GB purposes.

4. In the consultation draft LP (2014) [A/400] and the Publication Draft 2016, SADC proposed 4 of the BLGs (but none of the small-scale sub-areas) to deliver about 4000 units in the period to 2031. In the light of the 2014 Decision and the failed challenge to it, both versions recognised the existence of the SRFI permission and its implications [see e.g. A/405]. There was no proposed housing allocation of the Site or NER.

5. At a preliminary hearing into the 2016 Version however the Inspector concluded that the duty to co-operate had not been complied with. SADC's challenge to that decision failed in June 2017.

6. Meanwhile those against the SRFI were focussing on persuading HCC not to sell the land to Helioslough [see Chronology]. By late 2016, it was clear that the only potentially available route to avoid HCC having to sell for an SRFI was via securing an alternative allocation here. Thus, expressions of interest for a garden village on the Site were sought and received by HCC in 2016 and the Site was put forward by HCC to SADC in a SHLAA update in September 2017 [A/229] "*if the site is not required for [an SRFI]"*.

7. By 2017, it was clear that the housing requirement would be much higher than previously thought – about 913 per annum.

8. A number of options to meet the increased requirement to 2036 were set out for the planning policy committee in September 2017[13]. It was assumed that all 8 of the formerly identified BLG would be allocated (para 4.11) and a range of other possible options was considered (extension to existing villages, garden suburbs, garden towns and a garden village). An indicative trajectory at that time assumed 250 dwellings per annum from 2026 from a "Garden Village", some contribution from small GB releases

[13] Reports to the PPC are not included in the bundle because they will be well known to the Inspectors and SADC

and very small contributions from neighbourhood plans. Whilst SADC did not state as much at the time, it already had well in mind PSGV at the Site.

9. Throughout 2017, SADC's committees/reports were (inexplicably) silent on the need to provide an SRFI at the site. There was no consideration whatsoever of how to meet the housing and SRFI needs. Minutes of discussions with HCC at the time are (inexplicably) silent on the need to provide an SRFI at the site. Either SADC was inexplicably forgetting about the 2014 Decision re: the SRFI and the former policy formulation to address it, or they were deliberately creating a strategy to defeat the 2014 Decision by ignoring it. As demonstrated below, it was the latter.

10. By January 2018, SADC had decided that any major garden village release from the GB would have to deliver "unique" contributions to public services (e.g. public transport) and "unique" infrastructure and other benefits – criteria which were self-evidently formulated with the purpose of applying to and benefitting PSGV (the branch line and the country park).

11. An Issues and Options paper and call for sites was issued in January 2018. The Issues and Options paper was inexplicably silent on the need for an SRFI at the Site – ignoring the 2014 Decision, the previous draft policy formulation for the site; and the implications of not providing this nationally significant SRFI here.

12. In response to the call for sites in early 2018, HCC formally submitted its proposal for a housing allocation of the Site [A/242] which it had been promoting to defeat the SRFI (see below). Its proposed allocation was dependent on land over which it had no control and over which Helioslough has control. It was wrongly asserted that HCC could deliver.

13. In a letter dated 8th March 2018 [A/407], Helioslough explained the significance of the 2014 Permission in objecting to the HCC proposal. There has never been any response to that letter although (as shown below) it appears to have triggered an attempt by SADC to justify retrospectively housing on this site in preference to an SRFI through the Re-Evaluations.

14. In March 2018, the response to the Issues and Options consultation was reported and a site selection process was agreed. It used a RAG (red, amber, green) approach with the Stage 1 being based on contribution to GB purposes. Any site judged to have a "higher impact" on GB would be rejected. That term was not defined. Stage 2 was to consider overriding constraints on development and availability. Stage 3 was to consider all benefits and disbenefits in the round to form an overall judgment.

15. In May 2018, the results of the site ranking exercise were presented in a report to the 22nd May meeting of the PPC. The key points from the Report are as follows:

a. at stage 1, NER and Radlett were the only two new locations which were considered. The judgments reached by SADC at this stage are disputed and are addressed under the site specific issues in e.g. appendix 3 and Helioslough's reg 19 representations. A number of small sites which in 2013 had been identified as making least contribution to GB purposes were not taken forward – all small sites being automatically treated as "red";

b. the analysis of the Site referred to the existing SRFI permission. It was concluded that 2500 units would have "broadly the same" impact on the GB (at Stage 1) as the SRFI. There was said to be no reason to change the amber for GB by reference to the SRFI permission;

c. at stage 2, on "over-riding constraints to development", the Site inexplicably scored a green – no constraints. There was no consideration of the implications of the loss of the nationally significant SRFI, the inability to meet the need elsewhere, NPPF104/20/25-6 or the NPS. In accordance with basic principle, the Site should inevitably have been under ruled out at that stage.

d. There was no consideration of deliverability of the part of the Site not owned by HCC. There are insuperable obstacles to delivery of the necessary access because Helioslough has exclusive options over it and will not release those options.

e. At stage 3, given that the criteria on benefits had been pre-set to favour the allocation of the Site it is no surprise that the Site scored well at this stage. The weighting, the judgements reached and overall balancing were flawed. The benefits of the SRFI were not taken into account and the impacts of not delivering the nationally significant SRFI were not taken into account.

16. It is thus clear that the decisions on the Site were made and it was included in the emerging Local Plan (and NER also rated amber, other GB options rejected and small GB sites excluded) ***before*** any consideration of the implications for and of the SRFI. As we shall see that consideration was an afterthought.

17. At the meeting:
    a. the March 2018 letter from Helioslough was tabled raising all these points but there was (surprisingly and inexplicably) no comment or discussion on it;
    b. Hogan Lovells ("HL") on behalf of Helioslough had written in immediate response to the publication of the report for the 22nd May meeting of the PPC. The 21st May letter [A/410] explained the fundamental flaws underpinning the proposed allocation. Inexplicably it was not referred to the 22nd May committee;

c. members resolved to move forward with the process outlined in the report including the indicative local plan which even at that very early stage showed the site being allocated as a garden village - it was a fait accompli;
d. at the meeting of 22nd May and for *the first time* and "following legal advice" (no doubt in response to Segro's letter of March 2018) it was noted that the allocation of this site would require a fresh re-evaluation on the relative merits of housing and the SRFI (see HL letter of 30th May to Mr Briggs) and para 4.16 of the Report. The fundamental issue concerning the appropriateness of this site for housing was thus to be addressed for the first time in the local plan process – after the methodology and preferred approach had been confirmed and after the Site had been included as an allocation in the far advanced draft.

18. The "Draft Park Street Broad Location - re-Evaluation [sic] following the gathering of evidence on the relative merits of housing and the SRFI as well as alternative strategies which would deliver the identified housing elsewhere" ("the Draft Re-Evaluation") was then produced [A/152]. The position there set out was expressly subject to revision – "significant potential for revision" especially given the likely emergence of a new NPPF. "The regulation 19 formal consultation stage itself is yet to come. This stage and consideration of representations made at this stage will be an important matter for the Council in deciding on progress towards submission".

19. The June 2018 committees were to approve the publication draft Local Plan. At the 12/6/18 meeting, the HL letters were tabled and noted but (inexplicably) not the subject of any discussion. The Draft Re-Evaluation was included in the report but there was no discussion of it. The meeting adjourned to consider only the pro-formas returned by the landowners of the proposed sites. At the 18/6/18 meeting there was no discussion of the HL letters or the Draft Re-Evaluation. The Publication draft was silent on the SRFI. The Sustainability Appraisal Note for Council was silent on the SRFI and its analysis of factors was silent on the implications of not delivering the SRFI.

20. The essential point is this. In assessing the sites and in formulating the indicative publication draft, there was no explicit consideration whatsoever of the implications for the SRFI, the NPSNN or sustainability of not delivering the SRFI and no consideration of the disbenefits of allocating this site for housing by virtue of the loss of the SRFI. It was only at the last minute that an attempt was made to fill that hole in the justification for the allocation of the site. The Draft Re-Evaluation is fundamentally flawed at every point.

21. On 18th June, SADC received HCC's proforma on the site. It asserted confidence with site assembly. That is not understood – no approach to Helioslough has been made and their interests are vital to secure access to the proposed residential site. Delivery of the rail link and a new station was emphasised.

22. The publication draft and its SA were then worked up and published in September 2018. HL and RPS repeated the fundamental issues with the proposed allocation in further representations.

23. In March 2019, SADC received but made no comment on the updated re-evaluation on the SRFI versus housing [A/175]. In the summary of representations the issue raised was wrongly summarised as limited to the Plan not being positively prepared as it disregards the SRFI permission - the answer to which was only that:

> ***"Site selection is firmly based on comprehensive GB work which identified the allocated Broad Locations. The main site owners has promoted the site as available and deliverable for housing. Considerations have taken into account the existing planning permission for a alternative use and other relevant factors"***[14]

[14] See schedule of responses to consultation on policy S6(xi).

Appendix 3: Flawed approach to Other Housing Sites – Meeting the OAHN not at the Site

1. SADC has failed to justify why the choice of allocating growth in the 8 BLGs has not been supplemented by the allocation of smaller sites within smaller sub-areas that were assessed as making the least contribution towards Green Belt purposes.

2. SADC should have recognised that existing communities and settlements can have significant development capacity in association with related infrastructure investment, and that the creation of "new communities" in large sites is not the only, or here, the appropriate, option.

3. An adequate review of smaller sites would have allowed SADC to pursue broad locations for development, allocated the remaining housing growth in smaller sites and avoid the allocation of housing at the Site.

4. More specifically, the housing allocated in the PSGV (**2,300 dwellings**) of which only approximately **1,700** is intended to be delivered in the plan period, could readily be split and redistributed in smaller sites which have been omitted on Green Belt grounds without an appropriate Green Belt review of each of them. The more obvious alternative options for housing allocation include the site at North East Redbourn ("**NER**"), the Land at Gaddesden Lane, Redbourn ("**Gaddesden Lane**"), the Land at Windridge Farm ("**Windridge Farm**"), the land to the rear of Bridge Cottage ("**Carpenters Nursery**"), and the Land West of Redbourn ("**West Redbourn**").

5. The **NER** alone could accommodate **825 dwellings** in a village extension that would follow the existing pattern of development and could include services, care, education and community facilities. Contrary to what was suggested by SADC in the May 2018 PPC Report, the allocation of NER would not be, and does not need to be, a "substitute" to the allocation of the PSGV, but it would be one of the alternative sites which, collectively, would allow SADC to meet its OAHN and deliver the SRFI. With it, there would only be a requirement for about another 845 units in the plan period.

6. The Green Belt review prepared by the owners of NER and submitted in the Reg 19 representation demonstrates that the sites makes little or no contribution to the purposes of the Green Belt. Furthermore, Helioslough's Reg 19 representation demonstrates that the score of the PSGV in the SA should be downgraded, resulting in NER scoring higher in sustainability terms than PSGV. Taken together, the evidence available to SADC and the Inspector clearly shows that the NER has the credentials to be allocated for housing through a Main Modification of the Local Plan. Once the benefits of the SRFI are included in the analysis, the case for NER becomes overwhelming.

7. SADC's GBR in 2013 considered that **Gaddesden Lane** made limited or no contribution towards the five Green Belt purposes and could accommodate **339 dwellings**. However, the site was given a "red" rating at Stage 1 of the 2018 assessment because it marginally fell below the 500 dwellings or 14 hectares threshold required to be considered a "strategic site" due to it being partially within Dacorum Borough Council. In total it is larger than 14 ha. There is no evidence of any attempt by SADC to discuss this cross-boundary issue with DBC and why the findings of the 2013 GBR were ignored. The fact that it fell just below the threshold appears to have been fatal to its allocation. That is an unsound approach and contrary to the duty to co-operate.

8. The Reg 19 representations by the landowner show that the Gaddesden Lane site is a large single arable field in single ownership with existing reserved highway accesses and that no overriding issues would prevent its development within the plan period.

9. **Windridge Farm** was identified in the St Albans Emerging Core Strategy (July 2009), as a Proposed Strategic Housing Site (Area of Search 1) for the period to 2026 with an estimated potential to accommodate **between 1,000 to 1,200 dwellings**. The site was also included in the 2009 Strategic Housing Land Availability Assessment (SHLAA). Despite this, SADC restarted the allocation process afresh with all previous sites dismissed, including Windridge Farm. The starting point for SADC for identifying which large sites should be allocated for residential/mixed use development was the 2013 GBR, which itself was not subject to consultation. Only those parcels that contributed least to the purposes of the Green Belt were assessed further. However, if either then or now, Windridge Farm had been subject to a *site specific* rather than parcel wide green belt assessment in the same way as the green and amber sites had been, it would have been recognised that it had did not have such impacts on the Green Belt as to rule it out.

10. Whilst the site makes a partial contribution to the quite substantial gap between Hemel Hempstead and St Albans of 3.8km, it has strong boundaries on all sides including to the west towards Hemel Hempstead in the form of the A414/M1 junction, the A4147 and established woodland which would prevent further sprawl in this direction. The narrow gap of 0.2km between St Albans and Chiswell Green would not be compromised by development in this location given the existing intrusive nature of the A414 which forms the southern boundary of the land. The 2013 GBR also acknowledges that land adjoining St Albans has some urban influence.

11. The Regulation 19 representation submitted by the site's land promoter contains a detailed Development Framework Document setting out the vision, development parameters and expected housing numbers achievable on site through a masterplan

which would deliver around 1,200 homes, children play areas and sport pitches, a primary school, a new local centre and highway improvements. This detailed document demonstrates that the site is capable of accommodating a significant portion of SADC's housing needs during the early stages of the plan period in an urban extension of St Albans.

12. Hertfordshire County Council stated in its 2018 Call for Site submission that **Carpenters Nursery** could accommodate approximately **350 dwellings** if 50% of the site is developed at 30 dwellings per hectare. The site was considered as part of one of the larger Green Belt parcels (GB37) in the 2013 GBR. Again, the parcel wide assessment meant that the site specific characteristics were not assessed. That flaw then impacted the 2018 exercise too. The site lies directly to the east of the green-rated site, Land North of St Albans, which extends further north towards Harpenden than site 606 and is now identified as "North St Albans Broad Location" in Policy S6 (vi).

13. To avoid compromising the gap between St Albans and Sandridge along St Albans Road, there is potential to reduce the size of the site by moving the eastern boundary parallel with the garden centre. This would have limited impact on the Green Belt given the potential allocation of Land North of St Albans and the railway line to the west, in addition to the existing built development to the south of the site.

14. **West Redbourn** was not considered to "*significantly contribute to any of the 5 Green Belt purposes*" in the 2013 GBR but the site was subsequently removed from the pool of sites identified for development in the Local Plan without appropriate justification. Taking into account the existing constraints and opportunities on the site, the site is considered to have potential to deliver approximately **240 dwellings** at a density of 40 dwellings per hectare. According to the representor of the site's owner, the site is a deliverable and developable source of housing land with an expectation of completions achievable in the Plan Period.

15. Taken together, the sites mentioned above could accommodate between approximately **2,750 and 2,950** dwellings, thus allowing the delivery of housing required by SADC's OAHN within the plan period without the necessity of allocating housing at the Site and prevent/scupper the delivery of the SRFI.

Appendix 4: Transport issues relating to Park Street Garden Village

1. The location of the Site means that the existing transport connections and sustainable transport choices are limited for a garden village. The A414 dual carriageway to the north, the Midland Main Line railway to the east and the M25 to the south all form significant barriers for the range of transport connections required for a permeable and sustainable development. The ability to provide improved connections across each of these constraints is limited and potentially financially challenging.

2. With these constraints and the current Green Belt designation there are few existing public transport services in the area, with these limited to hourly buses to the west of the site and the hourly Abbey Line train service.

3. The only specific public transport proposal in the PSGV policy is for a peak period improvement to the Abbey Line service. Even if such a service is provided, this provision will only provide a very limited public transport function because it is located remotely from the residential development site, and the location of the Abbey Line station in St Albans is neither near the mainline station nor the city centre.

4. Given these circumstances it is unclear how the provision of a suitably located park and rail facility (*Policy S6 xi 14*) will support a sustainable development both in terms of attractiveness for users and vehicle emissions or how it justifies exceptional circumstances.

5. Given the limited public transport proposals suggested in the PSGV policy it is clear that there will need to major investment for bus services. As a minimum these will need to be to St Albans and use roads which have limited potential for bus priority.

6. A development of a minimum of 2,300 units will generate a significant volume of traffic and it has been shown that the PSGV will result in more traffic than the SRFI both at peak times and over 24 hours. This will be most acute in the AM peak hour (+ 81.5% as against the SRFI).

7. The SRFI was granted consent following detailed consultations on a transport strategy and mitigation which ensured that there was no adverse impact on the local highway network. This ensured that there was suitable capacity for the SRFI although additional capacity was limited.

8. Since the consent was granted HCC have produced the A414 Corridor Study which notes that '*Severe traffic congestion is experienced at different points along the corridor'.* It follows that the additional residential traffic volumes will be on a highway network with severe traffic conditions. The priorities for the A414 Corridor Study for

Segment 6 include maintaining the dual 2-lane carriageway standard on existing dualled sections but not seek an increase in highway link capacity. Hence it can be concluded that the residual impact with PSGV would be to add to the severe conditions on the A414.

9. Unlike the SRFI, the PSGV will generate more traffic movements on local roads, particularly the A5183 into St Albans, and to a lesser extent on the High Street in London Colney.

10. Given these points and as set out above, the SADC Sustainability Appraisal has been unrealistically optimistic in its grading of Greenhouse Gas Emissions, Air Quality and Sustainable Locations objectives of the PSGV. It is of course to be noted that it omits the sustainability advantages of an SRFI especially on GHG.

11. It can be concluded that the PSGV is unable to deliver the attributes of a garden village and at the same time it will generate a significant volume of traffic on a busy local road network. This is in contrast to the SRFI, which can provide a targeted transport strategy which meets the need of the specific attributes of such a facility without such adverse impact on the local highway network.

12. In relation to access, Hertfordshire County Council's agents acknowledged in their Regulation 19 representation that "*technical work on the access arrangements (to either the A414 or A5183) would need to be undertaken to inform the masterplan preparation process and to define the level of development that could be served by one or both of the access points. This work will take some months to complete*" and that the land on which the proposed main access to the site is proposed (the A414 access) is "*in the ownership of the Gorhambury Estate*". Helioslough has an exclusive option over that access land.

13. It is also worthy of note that the masterplan proposed by HCC in their Regulation 19 representation correctly <u>does not</u> attempt to suggest that the main vehicular access from the north to the PSGV could be further to the north east closer to the bridge. The provision of a suitable junction for 2,300 units on land outside the Gorhambury Estate is simply not possible. The limited land frontage owned by HCC means that it is not possible to provide an all movements junction with the A414. It might be thought that the current layby, which incorporates the bridleway entrance, could be used as a left in / left out junction. However, this would have serious implications on traffic capacity as up to 50% of arriving or departing vehicles would need to make U turns at the nearby congested junctions, thereby further reducing the capacity of the A414. In addition, as HCC highways made clear through the SRFI planning process, there is no ability to provide a suitable and safe physical access junction at the north east because

of the existing alignment of the A414, and particularly the railway bridge to the east. This means that most safety standards for approaches to a junction cannot be met; for example, the substandard horizontal and vertical approaches from the east are fixed by the bridge and there are substandard approach visibilities, which are particularly relevant on a road with a speed limit of 70mph.

Appendix 5: Feasibility of Abbey Line improvements

1. The proposals for upgrading the St Albans Abbey branch line to support housing development on and around the Site produced the following response from Network Rail in their 2016 presentation to local stakeholders, which noted:

    - Current journey times along the line do not allow for a 30-minute service frequency;
    - To achieve an enhanced service for all remitted options infrastructure interventions are required;
    - If Hertfordshire CC wish to progress the scheme to feasibility (GRIP 2) this will be as a third-party funded enhancement (for a cost of £257k);
    - Costs for the train service enhancements as proposed would range from £15m to £75m;
    - A full business case would need to take into consideration a range of factors including: rolling stock implications, any increase in operator subsidy or profit, agreement of Track Access Rights, DfT and train operator agreement, planning consents, revenue allocation, safety considerations and wider capacity utilisation on the West Coast Main Line.

2. The local stakeholders appear to have excluded any Network Rail involvement in, or validation of, a subsequent 2019 feasibility study into the possibility of upgrading Network Rail's infrastructure on the branch line. The report concludes that:

    - There is an 80% probability of the capital costs of this option being <£8.6m;
    - The value of the scheme benefits being sufficient to compensate for the capital expenditure, but not the operating costs;
    - A two-pronged strategy is recommended - seeking ways of reducing the operating costs, and other sources of funding income. Particularly promising for the latter are said to be potential development gain monies from a large local housing development at the Site;
    - However, the status of this passing loop project needs to be compared to other local transport ideas, also designed to address the worsening transport problems of the area;
    - The next stage of technical work might also aim to include open dialogue with Network Rail.

3. It is not understood on what basis it can now be said that the necessary Abbey Line improvements to support the PSGV allocation can be delivered.

Appendix 1 – SRFI Masterplan

COUNTRY PARK LEGEND

- Viewpoint
- Car Park
- Archaeological Feature
- Picnic Facilities

LEGEND

- Development Site Boundary
- LAL Retained Land
- Existing Vegetation
- Proposed Vegetation
- Proposed Hedge/Shrub & Scrub Planting
- Proposed Street Trees
- Existing Vegetation Removed
- Existing Water bodies and tributaries
- Proposed Water bodies
- Proposed earthmounding for the planting of new vegetation
- Proposed building

Proposed

NORTH

0 100 200 300

Rev	Date	By	Notes

Client
Helioslough Ltd

Project
Former Aerodrome Site, North Orbital

Drawing Title
Landscape Masterplan

Drawing Status
For Illustrative Purposes Only

Scale	Date	Drawn
1:7,500@A1	Dec'08	JG
Drawing No	**Checked**	**Approved**
394503-DSD-003	DG	RMK

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Appendix 2 – Legislation: S.19; S33A PCPA 2004

Planning and Compulsory Purchase Act 2004 c. 5
s. 19 Preparation of local development documents

Partially In Force With Amendments Pending

Version 6 of 6
18 January 2018 - Present

Subjects
Planning

Keywords
Local development documents; Local development schemes; Spatial development strategies; Wales Spatial Plan

19 Preparation of local development documents

(1) [Development plan documents] [1] must be prepared in accordance with the local development scheme.

[

(1A) Development plan documents must (taken as a whole) include policies designed to secure that the development and use of land in the local planning authority's area contribute to the mitigation of, and adaptation to, climate change.

] [2] [

(1B) Each local planning authority must identify the strategic priorities for the development and use of land in the authority's area.

(1C) Policies to address those priorities must be set out in the local planning authority's development plan documents (taken as a whole).

(1D) Subsection (1C) does not apply in the case of a London borough council or a Mayoral development corporation if and to the extent that the council or corporation are satisfied that policies to address those priorities are set out in the spatial development strategy.

(1E) If a combined authority established under section 103 of the Local Democracy, Economic Development and Construction Act 2009 has the function of preparing the spatial development strategy for the authority's area, subsection (1D) also applies in relation to—

(a) a local planning authority whose area is within, or the same as, the area of the combined authority, and

(b) the spatial development strategy published by the combined authority.

] [3]

(2) In preparing a [development plan document or any other] [4] local development document the local planning authority must have regard to–

(a) national policies and advice contained in guidance issued by the Secretary of State;

(b) [the regional strategy] [5] for the region in which the area of the authority is situated, if the area is outside Greater London;

(c) the spatial development strategy if the authority are a London borough or if any part of the authority's area adjoins Greater London;

(d) [the regional strategy][5] for any region which adjoins the area of the authority;

(e) the Wales Spatial Plan if any part of the authority's area adjoins Wales;

[...][6]

(h) any other local development document which has been adopted by the authority;

(i) the resources likely to be available for implementing the proposals in the document;

(j) such other matters as the Secretary of State prescribes.

(3) In preparing the [local development documents (other than their statement of community involvement)][7] the authority must also comply with their statement of community involvement.

(4) But subsection (3) does not apply at any time before the authority have adopted their statement of community involvement.

(5) The local planning authority must also–

(a) carry out an appraisal of the sustainability of the proposals in each [development plan document][8] ;

(b) prepare a report of the findings of the appraisal.

(6) The Secretary of State may by regulations make provision–

(a) as to any further documents which must be prepared by the authority in connection with the preparation of a local development document;

(b) as to the form and content of such documents.

[...][6]

Notes

1 Words substituted by Planning Act 2008 c. 29 Pt 9 c.2 s.180(5)(a) (April 6, 2009 in relation to England and Wales)
2 Added by Planning Act 2008 c. 29 Pt 9 c.2 s.182 (April 6, 2009 in relation to England and Wales)
3 Added by Neighbourhood Planning Act 2017 c. 20 Pt 1 s.8(1) (January 18, 2018)
4 Words inserted by Planning Act 2008 c. 29 Pt 9 c.2 s.180(5)(b) (April 6, 2009 in relation to England and Wales)
5 Words substituted by Local Democracy, Economic Development and Construction Act 2009 c. 20 Sch.5 para.14 (April 1, 2010)
6 Repealed by Deregulation Act 2015 c. 20 s.100(2)(b) (May 26, 2015)
7 Words substituted by Planning Act 2008 c. 29 Pt 9 c.2 s.180(5)(c) (April 6, 2009 in relation to England and Wales)
8 Word substituted by Planning Act 2008 c. 29 Pt 9 c.2 s.180(5)(d) (April 6, 2009 in relation to England and Wales)

Planning and Compulsory Purchase Act 2004 c. 5
s. 33A Duty to co-operate in relation to planning of sustainable development

Law In Force

Version 1 of 1
15 November 2011 - Present

Subjects
Planning

Keywords
Duty to co-operate; Local planning authorities; Sustainable development

[

33A Duty to co-operate in relation to planning of sustainable development

(1) Each person who is—

(a) a local planning authority,

(b) a county council in England that is not a local planning authority, or

(c) a body, or other person, that is prescribed or of a prescribed description,

must co-operate with every other person who is within paragraph (a), (b) or (c) or subsection (9) in maximising the effectiveness with which activities within subsection (3) are undertaken.

(2) In particular, the duty imposed on a person by subsection (1) requires the person—

(a) to engage constructively, actively and on an ongoing basis in any process by means of which activities within subsection (3) are undertaken, and

(b) to have regard to activities of a person within subsection (9) so far as they are relevant to activities within subsection (3).

(3) The activities within this subsection are—

(a) the preparation of development plan documents,

(b) the preparation of other local development documents,

(c) the preparation of marine plans under the Marine and Coastal Access Act 2009 for the English inshore region, the English offshore region or any part of either of those regions,

(d) activities that can reasonably be considered to prepare the way for activities within any of paragraphs (a) to (c) that are, or could be, contemplated, and

(e) activities that support activities within any of paragraphs (a) to (c),

so far as relating to a strategic matter.

(4) For the purposes of subsection (3), each of the following is a "strategic matter"—

(a) sustainable development or use of land that has or would have a significant impact on at least two planning areas, including (in particular) sustainable development or use of land for or in connection with infrastructure that is strategic and has or would have a significant impact on at least two planning areas, and

(b) sustainable development or use of land in a two-tier area if the development or use—

(i) is a county matter, or

(ii) has or would have a significant impact on a county matter.

(5) In subsection (4)—

"county matter" has the meaning given by paragraph 1 of Schedule 1 to the principal Act (ignoring sub-paragraph 1(1)(i)),

"planning area" means—

(a) the area of—

(i) a district council (including a metropolitan district council),

(ii) a London borough council, or

(iii) a county council in England for an area for which there is no district council,

but only so far as that area is neither in a National Park nor in the Broads,

(b) a National Park,

(c) the Broads,

(d) the English inshore region, or

(e) the English offshore region, and

"two-tier area" means an area—

(a) for which there is a county council and a district council, but

(b) which is not in a National Park.

(6) The engagement required of a person by subsection (2)(a) includes, in particular—

(a) considering whether to consult on and prepare, and enter into and publish, agreements on joint approaches to the undertaking of activities within subsection (3), and

(b) if the person is a local planning authority, considering whether to agree under section 28 to prepare joint local development documents.

(7) A person subject to the duty under subsection (1) must have regard to any guidance given by the Secretary of State about how the duty is to be complied with.

(8) A person, or description of persons, may be prescribed for the purposes of subsection (1)(c) only if the person, or persons of that description, exercise functions for the purposes of an enactment.

(9) A person is within this subsection if the person is a body, or other person, that is prescribed or of a prescribed description.

(10) In this section—

"the English inshore region" and *"the English offshore region"* have the same meaning as in the Marine and Coastal Access Act 2009, and

"land" includes the waters within those regions and the bed and subsoil of those waters.

]1

Notes

1 Added by Localism Act 2011 c. 20 Pt 6 c.1 s.110(1) (November 15, 2011)

Appendix 3 – Policy

b. NPPF

Ministry of Housing,
Communities &
Local Government

National Planning Policy Framework

The presumption in favour of sustainable development

11. Plans and decisions should apply a presumption in favour of sustainable development.

For **plan-making** this means that:

a) plans should positively seek opportunities to meet the development needs of their area, and be sufficiently flexible to adapt to rapid change;

b) strategic policies should, as a minimum, provide for objectively assessed needs for housing and other uses, as well as any needs that cannot be met within neighbouring areas[5], unless:

   i. the application of policies in this Framework that protect areas or assets of particular importance provides a strong reason for restricting the overall scale, type or distribution of development in the plan area[6]; or

   ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.

For **decision-taking** this means:

c) approving development proposals that accord with an up-to-date development plan without delay; or

d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date[7], granting permission unless:

   i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed[6]; or

   ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.

[5] As established through statements of common ground (see paragraph 27).
[6] The policies referred to are those in this Framework (rather than those in development plans) relating to: habitats sites (and those sites listed in paragraph 176) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, a National Park (or within the Broads Authority) or defined as Heritage Coast; irreplaceable habitats; designated heritage assets (and other heritage assets of archaeological interest referred to in footnote 63); and areas at risk of flooding or coastal change.
[7] This includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites (with the appropriate buffer, as set out in paragraph 73); or where the Housing Delivery Test indicates that the delivery of housing was substantially below (less than 75% of) the housing requirement over the previous three years. Transitional arrangements for the Housing Delivery Test are set out in Annex 1.

3. Plan-making

15. The planning system should be genuinely plan-led. Succinct and up-to-date plans should provide a positive vision for the future of each area; a framework for addressing housing needs and other economic, social and environmental priorities; and a platform for local people to shape their surroundings.

16. Plans should:

a) be prepared with the objective of contributing to the achievement of sustainable development[10];

b) be prepared positively, in a way that is aspirational but deliverable;

c) be shaped by early, proportionate and effective engagement between plan-makers and communities, local organisations, businesses, infrastructure providers and operators and statutory consultees;

d) contain policies that are clearly written and unambiguous, so it is evident how a decision maker should react to development proposals;

e) be accessible through the use of digital tools to assist public involvement and policy presentation; and

f) serve a clear purpose, avoiding unnecessary duplication of policies that apply to a particular area (including policies in this Framework, where relevant).

The plan-making framework

17. The development plan must include strategic policies to address each local planning authority's priorities for the development and use of land in its area[11]. These strategic policies can be produced in different ways, depending on the issues and opportunities facing each area. They can be contained in:

a) joint or individual local plans, produced by authorities working together or independently (and which may also contain non-strategic policies); and/or

b) a spatial development strategy produced by an elected Mayor or combined authority, where plan-making powers have been conferred.

18. Policies to address non-strategic matters should be included in local plans that contain both strategic and non-strategic policies, and/or in local or neighbourhood plans that contain just non-strategic policies.

19. The development plan for an area comprises the combination of strategic and non-strategic policies which are in force at a particular time.

[10] This is a legal requirement of local planning authorities exercising their plan-making functions (section 39(2) of the Planning and Compulsory Purchase Act 2004).
[11] Section 19(1B-1E) of the Planning and Compulsory Purchase Act 2004.

Strategic policies

20. Strategic policies should set out an overall strategy for the pattern, scale and quality of development, and make sufficient provision[12] for:

    a) housing (including affordable housing), employment, retail, leisure and other commercial development;

    b) infrastructure for transport, telecommunications, security, waste management, water supply, wastewater, flood risk and coastal change management, and the provision of minerals and energy (including heat);

    c) community facilities (such as health, education and cultural infrastructure); and

    d) conservation and enhancement of the natural, built and historic environment, including landscapes and green infrastructure, and planning measures to address climate change mitigation and adaptation.

21. Plans should make explicit which policies are strategic policies[13]. These should be limited to those necessary to address the strategic priorities of the area (and any relevant cross-boundary issues), to provide a clear starting point for any non-strategic policies that are needed. Strategic policies should not extend to detailed matters that are more appropriately dealt with through neighbourhood plans or other non-strategic policies.

22. Strategic policies should look ahead over a minimum 15 year period from adoption[14], to anticipate and respond to long-term requirements and opportunities, such as those arising from major improvements in infrastructure.

23. Broad locations for development should be indicated on a key diagram, and land-use designations and allocations identified on a policies map. Strategic policies should provide a clear strategy for bringing sufficient land forward, and at a sufficient rate, to address objectively assessed needs over the plan period, in line with the presumption in favour of sustainable development. This should include planning for and allocating sufficient sites to deliver the strategic priorities of the area (except insofar as these needs can be demonstrated to be met more appropriately through other mechanisms, such as brownfield registers or non-strategic policies)[15].

[12] In line with the presumption in favour of sustainable development.
[13] Where a single local plan is prepared the non-strategic policies should be clearly distinguished from the strategic policies.
[14] Except in relation to town centre development, as set out in chapter 7.
[15] For spatial development strategies, allocations, land use designations and a policies map are needed only where the power to make allocations has been conferred.

Maintaining effective cooperation

24. Local planning authorities and county councils (in two-tier areas) are under a duty to cooperate with each other, and with other prescribed bodies, on strategic matters that cross administrative boundaries.

25. Strategic policy-making authorities should collaborate to identify the relevant strategic matters which they need to address in their plans. They should also engage with their local communities and relevant bodies including Local Enterprise Partnerships, Local Nature Partnerships, the Marine Management Organisation, county councils, infrastructure providers, elected Mayors and combined authorities (in cases where Mayors or combined authorities do not have plan-making powers).

26. Effective and on-going joint working between strategic policy-making authorities and relevant bodies is integral to the production of a positively prepared and justified strategy. In particular, joint working should help to determine where additional infrastructure is necessary, and whether development needs that cannot be met wholly within a particular plan area could be met elsewhere.

27. In order to demonstrate effective and on-going joint working, strategic policy-making authorities should prepare and maintain one or more statements of common ground, documenting the cross-boundary matters being addressed and progress in cooperating to address these. These should be produced using the approach set out in national planning guidance, and be made publicly available throughout the plan-making process to provide transparency.

Non-strategic policies

28. Non-strategic policies should be used by local planning authorities and communities to set out more detailed policies for specific areas, neighbourhoods or types of development. This can include allocating sites, the provision of infrastructure and community facilities at a local level, establishing design principles, conserving and enhancing the natural and historic environment and setting out other development management policies.

29. Neighbourhood planning gives communities the power to develop a shared vision for their area. Neighbourhood plans can shape, direct and help to deliver sustainable development, by influencing local planning decisions as part of the statutory development plan. Neighbourhood plans should not promote less development than set out in the strategic policies for the area, or undermine those strategic policies[16].

30. Once a neighbourhood plan has been brought into force, the policies it contains take precedence over existing non-strategic policies in a local plan covering the neighbourhood area, where they are in conflict; unless they are superseded by strategic or non-strategic policies that are adopted subsequently.

[16] Neighbourhood plans must be in general conformity with the strategic policies contained in any development plan that covers their area.

Preparing and reviewing plans

31. The preparation and review of all policies should be underpinned by relevant and up-to-date evidence. This should be adequate and proportionate, focused tightly on supporting and justifying the policies concerned, and take into account relevant market signals.

32. Local plans and spatial development strategies should be informed throughout their preparation by a sustainability appraisal that meets the relevant legal requirements[17]. This should demonstrate how the plan has addressed relevant economic, social and environmental objectives (including opportunities for net gains). Significant adverse impacts on these objectives should be avoided and, wherever possible, alternative options which reduce or eliminate such impacts should be pursued. Where significant adverse impacts are unavoidable, suitable mitigation measures should be proposed (or, where this is not possible, compensatory measures should be considered).

33. Policies in local plans and spatial development strategies should be reviewed to assess whether they need updating at least once every five years, and should then be updated as necessary[18]. Reviews should be completed no later than five years from the adoption date of a plan, and should take into account changing circumstances affecting the area, or any relevant changes in national policy. Relevant strategic policies will need updating at least once every five years if their applicable local housing need figure has changed significantly; and they are likely to require earlier review if local housing need is expected to change significantly in the near future.

Development contributions

34. Plans should set out the contributions expected from development. This should include setting out the levels and types of affordable housing provision required, along with other infrastructure (such as that needed for education, health, transport, flood and water management, green and digital infrastructure). Such policies should not undermine the deliverability of the plan.

Examining plans

35. Local plans and spatial development strategies are examined to assess whether they have been prepared in accordance with legal and procedural requirements, and whether they are sound. Plans are ‘sound’ if they are:

[17] The reference to relevant legal requirements refers to Strategic Environmental Assessment. Neighbourhood plans may require Strategic Environmental Assessment, but only where there are potentially significant environmental effects.
[18] Reviews at least every five years are a legal requirement for all local plans (Regulation 10A of the Town and Country Planning (Local Planning) (England) Regulations 2012).

a) **Positively prepared** – providing a strategy which, as a minimum, seeks to meet the area's objectively assessed needs[19]; and is informed by agreements with other authorities, so that unmet need from neighbouring areas is accommodated where it is practical to do so and is consistent with achieving sustainable development;

b) **Justified** – an appropriate strategy, taking into account the reasonable alternatives, and based on proportionate evidence;

c) **Effective** – deliverable over the plan period, and based on effective joint working on cross-boundary strategic matters that have been dealt with rather than deferred, as evidenced by the statement of common ground; and

d) **Consistent with national policy** – enabling the delivery of sustainable development in accordance with the policies in this Framework.

36. These tests of soundness will be applied to non-strategic policies[20] in a proportionate way, taking into account the extent to which they are consistent with relevant strategic policies for the area.

37. Neighbourhood plans must meet certain 'basic conditions' and other legal requirements[21] before they can come into force. These are tested through an independent examination before the neighbourhood plan may proceed to referendum.

[19] Where this relates to housing, such needs should be assessed using a clear and justified method, as set out in paragraph 60 of this Framework.
[20] Where these are contained in a local plan.
[21] As set out in paragraph 8 of Schedule 4B to the Town and Country Planning Act 1990 (as amended).

9. Promoting sustainable transport

102. Transport issues should be considered from the earliest stages of plan-making and development proposals, so that:

a) the potential impacts of development on transport networks can be addressed;

b) opportunities from existing or proposed transport infrastructure, and changing transport technology and usage, are realised – for example in relation to the scale, location or density of development that can be accommodated;

c) opportunities to promote walking, cycling and public transport use are identified and pursued;

d) the environmental impacts of traffic and transport infrastructure can be identified, assessed and taken into account – including appropriate opportunities for avoiding and mitigating any adverse effects, and for net environmental gains; and

e) patterns of movement, streets, parking and other transport considerations are integral to the design of schemes, and contribute to making high quality places.

103. The planning system should actively manage patterns of growth in support of these objectives. Significant development should be focused on locations which are or can be made sustainable, through limiting the need to travel and offering a genuine choice of transport modes. This can help to reduce congestion and emissions, and improve air quality and public health. However, opportunities to maximise sustainable transport solutions will vary between urban and rural areas, and this should be taken into account in both plan-making and decision-making.

104. Planning policies should:

a) support an appropriate mix of uses across an area, and within larger scale sites, to minimise the number and length of journeys needed for employment, shopping, leisure, education and other activities;

b) be prepared with the active involvement of local highways authorities, other transport infrastructure providers and operators and neighbouring councils, so that strategies and investments for supporting sustainable transport and development patterns are aligned;

c) identify and protect, where there is robust evidence, sites and routes which could be critical in developing infrastructure to widen transport choice and realise opportunities for large scale development;

d) provide for high quality walking and cycling networks and supporting facilities such as cycle parking (drawing on Local Cycling and Walking Infrastructure Plans);

e) provide for any large scale transport facilities that need to be located in the area[42], and the infrastructure and wider development required to support their operation, expansion and contribution to the wider economy. In doing so they should take into account whether such development is likely to be a nationally significant infrastructure project and any relevant national policy statements; and

f) recognise the importance of maintaining a national network of general aviation airfields, and their need to adapt and change over time – taking into account their economic value in serving business, leisure, training and emergency service needs, and the Government's General Aviation Strategy[43].

105. If setting local parking standards for residential and non-residential development, policies should take into account:

a) the accessibility of the development;

b) the type, mix and use of development;

c) the availability of and opportunities for public transport;

d) local car ownership levels; and

e) the need to ensure an adequate provision of spaces for charging plug-in and other ultra-low emission vehicles.

106. Maximum parking standards for residential and non-residential development should only be set where there is a clear and compelling justification that they are necessary for managing the local road network, or for optimising the density of development in city and town centres and other locations that are well served by public transport (in accordance with chapter 11 of this Framework). In town centres, local authorities should seek to improve the quality of parking so that it is convenient, safe and secure, alongside measures to promote accessibility for pedestrians and cyclists.

107. Planning policies and decisions should recognise the importance of providing adequate overnight lorry parking facilities, taking into account any local shortages, to reduce the risk of parking in locations that lack proper facilities or could cause a nuisance. Proposals for new or expanded distribution centres should make provision for sufficient lorry parking to cater for their anticipated use.

Considering development proposals

108. In assessing sites that may be allocated for development in plans, or specific applications for development, it should be ensured that:

[42] Policies for large scale facilities should, where necessary, be developed through collaboration between strategic policy-making authorities and other relevant bodies. Examples of such facilities include ports, airports, interchanges for rail freight, public transport projects and roadside services. The primary function of roadside services should be to support the safety and welfare of the road user (and most such proposals are unlikely to be nationally significant infrastructure projects).
[43] Department for Transport (2015) *General Aviation Strategy*.

Annex 2: Glossary

Affordable housing: housing for sale or rent, for those whose needs are not met by the market (including housing that provides a subsidised route to home ownership and/or is for essential local workers); and which complies with one or more of the following definitions:

a) **Affordable housing for rent:** meets all of the following conditions: (a) the rent is set in accordance with the Government's rent policy for Social Rent or Affordable Rent, or is at least 20% below local market rents (including service charges where applicable); (b) the landlord is a registered provider, except where it is included as part of a Build to Rent scheme (in which case the landlord need not be a registered provider); and (c) it includes provisions to remain at an affordable price for future eligible households, or for the subsidy to be recycled for alternative affordable housing provision. For Build to Rent schemes affordable housing for rent is expected to be the normal form of affordable housing provision (and, in this context, is known as Affordable Private Rent).

b) **Starter homes:** is as specified in Sections 2 and 3 of the Housing and Planning Act 2016 and any secondary legislation made under these sections. The definition of a starter home should reflect the meaning set out in statute and any such secondary legislation at the time of plan-preparation or decision-making. Where secondary legislation has the effect of limiting a household's eligibility to purchase a starter home to those with a particular maximum level of household income, those restrictions should be used.

c) **Discounted market sales housing:** is that sold at a discount of at least 20% below local market value. Eligibility is determined with regard to local incomes and local house prices. Provisions should be in place to ensure housing remains at a discount for future eligible households.

d) **Other affordable routes to home ownership:** is housing provided for sale that provides a route to ownership for those who could not achieve home ownership through the market. It includes shared ownership, relevant equity loans, other low cost homes for sale (at a price equivalent to at least 20% below local market value) and rent to buy (which includes a period of intermediate rent). Where public grant funding is provided, there should be provisions for the homes to remain at an affordable price for future eligible households, or for any receipts to be recycled for alternative affordable housing provision, or refunded to Government or the relevant authority specified in the funding agreement.

Air quality management areas: Areas designated by local authorities because they are not likely to achieve national air quality objectives by the relevant deadlines.

Ancient or veteran tree: A tree which, because of its age, size and condition, is of exceptional biodiversity, cultural or heritage value. All ancient trees are veteran trees. Not all veteran trees are old enough to be ancient, but are old relative to other trees of the same species. Very few trees of any species reach the ancient life-stage.

Ancient woodland: An area that has been wooded continuously since at least 1600 AD. It includes ancient semi-natural woodland and plantations on ancient woodland sites (PAWS).

Spatial development strategy: A plan containing strategic policies prepared by a Mayor or a combined authority. It includes the London Plan (prepared under provisions in the Greater London Authority Act 1999) and plans prepared by combined authorities that have been given equivalent plan-making functions by an order made under the Local Democracy, Economic Development and Construction Act 2009 (as amended).

Stepping stones: Pockets of habitat that, while not necessarily connected, facilitate the movement of species across otherwise inhospitable landscapes.

Strategic environmental assessment: A procedure (set out in the Environmental Assessment of Plans and Programmes Regulations 2004) which requires the formal environmental assessment of certain plans and programmes which are likely to have significant effects on the environment.

Strategic policies: Policies and site allocations which address strategic priorities in line with the requirements of Section 19 (1B-E) of the Planning and Compulsory Purchase Act 2004.

Strategic policy-making authorities: Those authorities responsible for producing strategic policies (local planning authorities, and elected Mayors or combined authorities, where this power has been conferred). This definition applies whether the authority is in the process of producing strategic policies or not.

Supplementary planning documents: Documents which add further detail to the policies in the development plan. They can be used to provide further guidance for development on specific sites, or on particular issues, such as design. Supplementary planning documents are capable of being a material consideration in planning decisions but are not part of the development plan.

Sustainable transport modes: Any efficient, safe and accessible means of transport with overall low impact on the environment, including walking and cycling, low and ultra low emission vehicles, car sharing and public transport.

Town centre: Area defined on the local authority's policies map, including the primary shopping area and areas predominantly occupied by main town centre uses within or adjacent to the primary shopping area. References to town centres or centres apply to city centres, town centres, district centres and local centres but exclude small parades of shops of purely neighbourhood significance. Unless they are identified as centres in the development plan, existing out-of-centre developments, comprising or including main town centre uses, do not constitute town centres.

Transport assessment: A comprehensive and systematic process that sets out transport issues relating to a proposed development. It identifies measures required to improve accessibility and safety for all modes of travel, particularly for alternatives to the car such as walking, cycling and public transport, and measures that will be needed deal with the anticipated transport impacts of the development.

Transport statement: A simplified version of a transport assessment where it is agreed the transport issues arising from development proposals are limited and a full transport assessment is not required.

Appendix 4 - Key Relevant Inspectors Reports and Decision Letters extracts

a. Radlett 2014 Decision

Department for Communities and Local Government

Our Ref: APP/B1930/A/09/2109433
Your Ref: 5/09/0708

14 July 2014

Erica Mortimer
CgMS Ltd
Morley House
26 Holborn Viaduct
London
ED1A 2AT

Dear Madam

TOWN AND COUNTRY PLANNING ACT 1990 – SECTION 78
APPEAL BY HELIOSLOUGH LTD
LAND IN AND AROUND FORMER AERODROME, NORTH ORBITAL ROAD, UPPER COLNE VALLEY, HERTFORDSHIRE
APPLICATION: REF 5/09/0708

1. I am directed by the Secretary of State to say that consideration has been given to the report of the Inspector, A Mead BSc (Hons) MRTPI MIQ, who held a public local inquiry between 24 November and 18 December 2009 into your client's appeal against a decision by St Albans City & District Council (the Council) to refuse outline planning permission for the construction of a Strategic Rail Freight Interchange (SRFI) comprising an intermodal terminal and rail and road served distribution units (331,665m^2 in Use Class B8 including ancillary B1/B2 floorspace) within Area 1, with associated road, rail and other infrastructure facilities and works within Areas 1 and 2, (including earth mounds and a Park Street/Frogmore relief road) in a landscaped setting, and further landscaping and other works within Areas 3 to 8 inclusive to provide publicly accessible open land and community forest, at land in and around Former Aerodrome, North Orbital Road, Upper Colne Valley, Hertfordshire in accordance with application Ref 5/09/0708 dated 9 April 2009.

2. On 29 July 2009, the appeal was recovered for the Secretary of State's determination, in pursuance of section 79 of, and paragraph 3 to Schedule 6 to, the Town and Country Planning Act 1990. This was because the appeal concerns a proposal for development of major importance having more than local significance and because it is for significant development within the Green Belt.

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3. The Secretary of State issued his decision in respect of the above appeal in his letter dated 7 July 2010. That decision letter was the subject of an application to the High Court and was subsequently quashed by order of the Court dated 4 July 2011. The appeal therefore falls to be redetermined by the Secretary of State.

Inspector's recommendation and summary of the decision

4. The Inspector recommended that the appeal be allowed and planning permission granted. For the reasons given below, the Secretary of State agrees with the Inspector's conclusions, except where stated. He has decided to allow the appeal and grant planning permission. A copy of the Inspector's report (IR) is enclosed. All references to paragraph numbers, unless otherwise stated, are to the IR.

Matters arising since 7 July 2010

5. Following the quashing of his decision letter of 7 July 2010, the Secretary of State issued a letter, dated 15 September 2011, under Rule 19 of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000, to all interested parties, setting out a written statement of the matters with respect to which further representations were invited for the purposes of his re-determination of the appeal. These matters were:

a. The views expressed by the Secretary of State in paragraph 33 of the quashed decision letter with regard to the Inspector's proposed Condition 33 - alternatives 1- 3, and the weight to be given to the planning obligation in the form submitted by the appellant and made by unilateral undertaking dated 16 January 2008.

b. Whether or not Hertfordshire County Council is prepared to join as a party to the undertaking in the light of the Secretary of State's comments made in paragraphs 32 and 33 of the quashed decision letter; or if the parties to the undertaking wish him to consider any other amendments to the undertaking which might overcome his concerns about its enforceability.

c. Any new matters or change in circumstances which the parties consider to be material to the Secretary of State's further consideration of this appeal.

6. On 19 October 2011, the Secretary of State circulated the responses he had received to his letter of 15 September 2011. On 29 November 2011 he circulated the responses he had received to his letter of 19 October 2011, and invited comments on the Department for Transport's updated policy guidance note on Strategic Rail Freight Interchanges, the Department for Transport's review document on logistics growth, and a joint Written Ministerial Statement on Strategic Rail Freight Interchanges issued by the Secretary of State for Transport and the Secretary of State for Communities and Local Government.

7. On 1 February 2012, the Secretary of State circulated the responses he had received to his letter of 29 November 2011 and stated that he was of the view that he was in a position to re-determine the appeal on the basis of all the evidence and representations before him.

8. Following the publication of the National Planning Policy Framework ("the Framework"), which replaced the national planning policy documents set out in its Annex 3, the Secretary of State wrote to parties on 29 March 2012 inviting comments on the relevance of the Framework to this appeal. On 18 April he circulated the responses he had received to his letter of 29 March. The Secretary of State has given careful

consideration to all of the representations received and he considers that, for the most part, the issues raised in relation to the Framework cover those already rehearsed at the inquiry. In considering these further representations the Secretary of State wishes to make clear that he has not revisited issues which are carried forward in the Framework, and which have therefore already been addressed in the IR, unless the approach in the Framework leads him to give different weight. Notwithstanding the replacement of the majority of former national planning policy documents by the Framework, the Secretary of State considers that the main issues identified by the Inspector remain essentially the same.

9. On 19 September 2012, the Secretary of State wrote to parties inviting comments on re-opening the inquiry into the Radlett appeal and conjoining it with the planned inquiry into the proposed SRFI at Colnbrook, Slough (Appeal Reference: APP/J0350/A/12/2171967). On 12 October 2012 the Secretary of State wrote to parties and circulated copies of the responses he had received to his letter of 19 September 2012. On 14 December 2012 the Secretary of State wrote to parties stating that he had concluded that it was unnecessary for him to re-open the inquiry into the Radlett appeal and conjoin it with the planned inquiry into the Colnbrook appeal and that he was satisfied that he could determine the Radlett proposal on the basis of the evidence before him.

10. The Secretary of State wrote to you on 20 December 2012 indicating that he was minded to allow the appeal subject to the provision of a suitable planning obligation which binds all of those with an interest in the appeal site. You submitted a new planning obligation (dated 19 December 2013) on 20 December 2013 and, on 19 February 2014, the Secretary of State wrote to parties inviting comments on that obligation. On 14 March 2014, the Secretary of State circulated the responses he had received and invited comments on (i) those responses, (ii) the Planning Practice Guidance (the Guidance) published on 6 March 2014 and the cancellation of previous planning practice guidance documents, and (iii) any material changes of circumstances that have occurred since 20 December 2012. On 1 April 2014, the Secretary of State circulated the responses he had received and invited final comments on those representations.

11. Responses received following the letters referred to above and the other representations received following the close of the inquiry are listed at Annex A below. The Secretary of State has given all these representations very careful consideration in his determination of this appeal. He is satisfied that those representations which have not been circulated to interested parties do not raise any matters that would affect his decision or require him to refer back to parties on their contents for further representations prior to reaching his decision. Copies of the representations referred to are not attached to this letter. However, copies will be made available to interested parties on written request to either of the addresses at the foot of the first page of this letter.

Procedural Matters

12. In reaching his decision, the Secretary of State has taken into account the Environmental Statement (ES) which was submitted under the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 and the Inspector's comments at IR13.7. The Secretary of State is content that the Environmental Statement complies with the above regulations and that sufficient information has been provided for him to assess the environmental impact of the proposal.

13. At the Inquiry, an application for award of costs was made by your client against St Albans City & District Council. This application was decided by the Secretary of State in his costs decision letter of 7 July 2010.

Policy considerations

14. In determining the appeal, the Secretary of State has had regard to section 38(6) of the Planning and Compulsory Purchase Act 2004 which requires that proposals be determined in accordance with the development plan unless material considerations indicate otherwise.

15. In this case, the relevant parts of the development plan comprise the saved policies of the City and District of St Albans Local Plan Review (LP), adopted 1994. The Secretary of State considers that the development plan policies most relevant to this case are those referred to by the Inspector at IR13.27. He is satisfied that these policies are generally consistent with the Framework.

16. Other material considerations which the Secretary of State has taken into account include: the Framework; the Guidance; the Community Infrastructure Levy (CIL) Regulations; The London Plan 2011 (as amended October 2013) including Policies 6.14 and 6.15 and the draft further alterations to the London Plan (January 2014).

17. The Secretary of State has also had regard to the Strategic Rail Authority's (SRA) *Strategic Rail Freight Interchange Policy* (published in 2004) as a material consideration. He has taken account of the Inspector's comments on the document (IR13.30 – 32) and he agrees with the Inspector that, although the SRA has ceased and some of its former responsibilities have transferred to Network Rail, the document is still a source of advice and guidance (IR13.30). The Secretary of State has also taken account of the Department for Transport's Strategic Rail Freight Interchange Policy Guidance and its Logistics Growth Review Document (both published on 29 November 2011), and the joint Written Ministerial Statement on Strategic Rail Freight Interchanges issued by the Secretary of State for Transport and the Secretary of State for Communities and Local Government on 29 November 2011.

18. He has also had regard to Slough's Core Strategy 2006-2026 (2008), the saved policies of the Slough Local Plan (2004) and the Revised Pre-submission Version of the Development Strategy for Central Bedfordshire (DSCB) (June 2013).

19. The East of England Plan (EEP) formed part of the development plan when the Inspector wrote his report. The Order revoking the Plan had been laid but had not come into force when the Secretary of State issued his letter of 20 December 2012. However the EEP was revoked on 3 January 2013 and the Secretary of State has not had regard to it in his determination of this case.

20. The South East Plan (SEP), which was a material consideration when the Inspector wrote his report and which remained in place and attracted limited weight when the Secretary of State issued his letter of 20 December 2012, was partially revoked on 25 March 2013. The Secretary of State has not had regard to it in his determination of this case.

21. The Secretary of State has taken account of the fact that the Inspector attributes little weight to the emerging St Albans City and District Core Strategy Development Plan Document which was published in 2009 (IR13.28). The Secretary of State notes that,

since the IR was written, the Council has taken a number of steps in the development of new development plan documents. However, at this stage the Council's emerging development plan is not sufficiently advanced to carry material weight.

Legal Submissions

22. In addition to the material considerations referred to above, the Secretary of State has taken account of Inspector Phillipson's report dated 4 June 2008 and the associated decision letter dated 1 October 2008. The Secretary of State has considered the Inspector's comments on the submissions made by your client, the Council and STRIFE about how the current case should be approached in view of the Secretary of State's 2008 decision on the appeal site (IR13.8 – 13.18). For the reasons given by the Inspector in those paragraphs, he agrees with the Inspector's conclusion at IR13.19 that, if there is a very good planning reason, he is able to differ from the conclusions or decision of his predecessor.

Main issues

23. The Secretary of State considers that the main issues in this case are those set out by the Inspector at IR13.20 and whether the proposal complies with the development plan and with national policy.

Green Belt

24. Having had regard to the Inspector's comments at IR13.35, the Secretary of State concludes that the appeal proposal would be inappropriate development in the Green Belt and that it is harmful as such. As the proposal amounts to inappropriate development he considers that, in the absence of very special circumstances, it would conflict with national policies and with LP policy 1 which concern the protection of the Green Belt. The Secretary of State agrees with the Inspector's further analysis at IR13.35 and concludes that the proposal would have a substantial impact on the openness of the Green Belt, that it would result in significant encroachment into the countryside, that it would contribute to urban sprawl and that it would cause some harm to the setting of St Albans. For the reasons given by the Inspector at IR13.36 – 13.39, the Secretary of State is satisfied that the proposal would not lead to the merging of neighbouring towns (IR13.38). He also agrees with the Inspector's analysis and conclusion that the aim to encourage the recycling of derelict and other urban land would not be frustrated by the proposal (IR13.40).

Other Harm

25. The Secretary of State agrees with the Inspector's reasoning and conclusions with respect to the proposal's landscape and visual impact, as set out at IR13.41 – 13.44. Like the Inspector, he considers that the effect of the proposal on the landscape and visual impact would be moderately adverse and would be contrary to Policy 104 of the LP (IR13.44).

26. In 2008, the former Secretary of State found that the harm to ecological matters would not be significant (IR13.45). However, for the reasons given by the Inspector (IR13.45 – 13.46), the Secretary of State shares his view that the proposal would conflict with Policy 106 of the LP (IR13.45) and, despite there being no more bird species recorded than there were at the time of the previous Inquiry and despite the lack of objection from Natural England, more weight should be attached to the harm to ecological interests (IR13.46).

27. Having taken account of the section 3.2.4 of the November 2011 Strategic Rail Freight Interchange Policy Guidance, which states that the availability of an available and economic workforce will be an important consideration and the Inspector's comments at IR13.47 – 13.48, the Secretary of State agrees with the Inspector and he too concludes that it would not be reasonable to refuse planning permission for the development on account of sustainability concerns relating to the likely pattern of travel to work by the workforce (IR13.48).

28. The Secretary of State has given careful consideration to the Inspector's assessment of the impact of the proposal on highways, as set out at IR13.49 – 13.58, and agrees with his reasoning and conclusions on this matter. Whilst he has taken account of the comments on highways matters put forward by interested parties following the close of the inquiry, including the matters raised by Anne Main MP in her letters of 5 March (and her attached letter dated 27 January 2014) and 14 April 2014 and the concern expressed in the letter dated 27 March 2014 from the Radlett Society & Green Belt Association, he does not consider that highway concerns amount to a reason for refusal in this case.

29. The Secretary of State agrees with the Inspector's analysis, as set out at IR13.59 – 13.71, with regard to the impact of noise generated by the proposed development. He has given careful consideration to the point about noise made by STRIFE in its letter of 15 April 2014 and the statement from Network Rail in its letter of 26 March 2014 that the connections to and from the Radlett terminal should be designed to be capable of 45mph operation. He observes that the question of when and how the junction will be used by trains entering and exiting the SRFI is a matter for negotiation with Network Rail and he does not consider that STRIFE's representation undermines his conclusions in relation to noise. Like the Inspector (IR13.71), he is satisfied that, with the inclusion of the three conditions on noise, the noise generated by the activity of the site during the night would not be unacceptable and would not bring the proposal into conflict with the development plan.

30. The Secretary of State agrees with the Inspector's reasoning and conclusions with respect to air quality and lighting issues (IR13.72 – 13.73), the impact of the proposal on Park Street and Frogmore and the Napsbury Conservation Area (IR13.74) and the impact on existing footpaths and bridleways (IR13.75).

Other considerations

31. The Secretary of State has had regard to the Inspector's comment at IR13.34 that, as the Council accepted in evidence, the need for SRFIs is stated and restated in a number of documents. The Secretary of State observes that the Written Ministerial Statement of 29 November 2011 makes clear that there remains a need for a network of SRFIs to support growth and create employment and that it has proved extremely problematical, especially in the South East, to create appropriately located SRFIs. The SRFI Policy Guidance published on 29 November 2011 states that only one SRFI had been granted planning consent in the whole of the South East region and advises that SRFI capacity needs to be provided at a wide range of locations, particularly but not exclusively serving London and the South East. The Secretary of State has had regard to the comment made by STRIFE (letter of 4 March 2014) that the proposed SRFI at Howbury Park has not been delivered. However, he tends to the view that this only serves to reinforce the point made in the 2011 Written Ministerial Statement on Strategic Rail Freight Interchanges that, in the South East in particular, it is proving extremely problematical to develop SRFIs.

Whether the development would operate as an SRFI

32. The Secretary of State has carefully considered the Inspector's analysis and conclusions as to whether the development would operate as an SRFI including his statement (IR13.79) that Network Rail does not consider that there are any major technical obstacles to achieving a connection such as is proposed at the site (IR13.76 – 13.83). He has also taken account of the further comments on this matter submitted following the close of the inquiry, including the letters from STRIFE dated 4 March and 15 April 2014 which raise the matter of junction speed. The Secretary of State has also given careful consideration to your representation dated 28 March 2014 and the letters of 1 November 2011 and 26 March 2014 from Network Rail, and those dated 11 November 2011 and 31 March 2014 from the Department for Transport. He observes that the letter dated 31 March 2014 states that Network Rail, as both the owner and operator of the rail infrastructure and the author of a very recent Freight Market Study that seeks to identify the market demand and infrastructure needs for rail freight over the coming thirty years, may be regarded as authoritative on these matters. Having taken account of the comments made, the Secretary of State sees little reason to doubt Network Rail's view that there is no good reason why a junction at Radlett capable of 45 mile per hour operation cannot be achieved.

33. Overall, the Secretary of State sees no good reason to disagree with the Inspector's analysis or with his conclusions that the timetabling and bidding process should ensure that sufficient paths to enable access to be gained would be made available to serve the SRFI during the interpeak hours and overnight (IR13.80) and that he can be satisfied of the ability of the SRFI to be accessed from all the key destinations (IR13.82). He further agrees that there is no reason to doubt that the Midland Main Line will develop as a key part of the rail freight network and that the aim of Network Rail and rail regulators will be to enable freight to be carried efficiently, albeit without compromising its passenger carrying ability (IR13.83).

Alternatives

34. For the reasons given at IR13.84 – 13.88, the Secretary of State agrees with the Inspector that the broad approach of the appellant in focusing on the north west sector in the assessment of alternatives is reasonable (IR13.88). He agrees with the Inspector, for the reasons given at IR13.89 – 13.91, that the general approach by the appellant to the assessment of alternatives and producing the 'long list' has been robust and realistically pragmatic (IR13.91). The Secretary of State sees no reason to disagree with the Inspector's comments on the appellant's assessment of the long list sites (IR13.92 – 13.94).

35. The Secretary of State notes that, at the inquiry, the cases put forward by the Council and by STRIFE included argument in relation to London Gateway (LG) and that, in his conclusions the Inspector refers to LG at IR13.85 and IR13.88. A number of the representations submitted to the Secretary of State since his letter of 20 December 2012 have also referred to LG. In particular Anne Main MP (7 January 2014) and STRIFE (4 March and 15 April 2014) both state that the opening of the LG container port amounts to a material change in respect of this proposal. Barton Willmore in its letter of 27 March 2014, Network Rail in its letter of 26 March 2014 and you, in your representation of 28 March 2014, disagree with that view. The Secretary of State has given careful consideration to the views submitted alongside the Inspector's analysis and conclusions and he concludes that there is no good reason to consider that the opening of LG undermines the Alternative Sites Assessment or the Inspector's views on LG at IR13.85.

36. The Secretary of State has given very careful consideration to the Inspector's comments about the appellant's short listed sites (IR13.95 – 13.103). He sees no reason to disagree with the Inspector's remarks about the sites at Littlewick Green or Harlington (IR13.95 – 13.98).

37. With regard to the Upper Sundon site, the Secretary of State has taken account of the Inspector's remark that that there was no suggestion by any party that Upper Sundon scored better than the appeal site and that the Inspector saw no reason to disagree with that (IR13.95). The Secretary of State observes that the 2014 version of the emerging DSCB includes policy 64 which allocates 5 hectares of land at Sundon for an intermodal rail facility and states that the Green Belt boundary follows the extent of the rail freight interchange. As the submission version of the DSCB has yet to be published, the Secretary of State considers that this limits the weight to be attributed to the document.

38. A number of representations (including those from Anne Main MP dated 27 January and 14 April 2014 and those from STRIFE dated 4 March and 15 April 2014) have pointed to the Upper Sundon site as offering a preferable alternative to Radlett. The Secretary of State observes that Network Rail, in its letter dated 26 March 2014, states that it has worked with the developers of both the Sundon and the Radlett schemes, that Sundon is a significantly smaller site than Radlett and that it does not consider that the two proposals fulfil the same purpose or act as alternatives to each other. The Secretary of State sees no reason to disagree with the view of the Department for Transport in its letter of 31 March 2014 that Network Rail, as both the owner and operator of the rail infrastructure and author of the Freight Market Study, may be regarded as authoritative on these matters and he gives the views of Network Rail full weight. In conclusion on this matter, the Secretary of State does not consider that the Sundon site can be regarded as a preferable alternative to the proposal before him.

39. The Secretary of State has had regard to the Inspector's assessment of the site identified at Colnbrook (IR13.99 – 13.103) and the fact that appeal reference: APP/J0350/A/12/2171967 was made on 5 March 2012. As indicated by the Inspector (IR13.100), the Strategic Gap designation has been brought forward in Slough's adopted Core Strategy. The Secretary of State observes that the Core Strategy states that development will only be permitted in the Strategic Gap if it is essential to be in that location. He has also had regard to the High Court judgment referred to at paragraph 3 above, in which the judge held (at paragraph 79) that the Slough Core Strategy sets an additional policy restraint beyond that which follows from the site's location in the Green Belt. In common with the Inspector (IR13.100), the Secretary of State attributes substantial weight to the Strategic Gap designation. In conclusion on this matter, the Secretary of State sees no reason to disagree with the Inspector's analysis and conclusions in respect of Colnbrook (IR13.100 – 13.103).

Other benefits

40. Having had regard to the Inspector's analysis at IR13.104, the Secretary of State shares his view that the Park Street and Frogmore bypass is a local benefit which carries a little weight. He also agrees with the Inspector's reasoning and conclusions with regard to the proposals for Areas 3 to 8 (IR13.105).

The Planning Balance including Prematurity

41. The Secretary of State agrees with the Inspector's comments at IR13.106. He has concluded (at paragraph 24 above) that the proposal would constitute inappropriate development and that further harm would arise from a substantial loss of openness,

significant encroachment into the countryside and that the development would contribute to urban sprawl. He considers that the harm arising thereby would be substantial and that, in addition, some further harm would be caused to the setting of the historic city of St Albans (IR13.106). In line with paragraph 88 of the Framework, the Secretary of State has attached substantial weight to the harm that the appeal scheme would cause to the Green Belt.

42. As set out at paragraph 25 above, the Secretary of State has concluded that the effect of the proposal on the landscape and visual impact would be moderately adverse and that it would be contrary to Policy 104 of the LP. In addition, he has found that conflict would arise in respect of LP Policy 106 and that the harm to ecological interests should be given more weight than in 2008 (paragraph 26 above).

43. In common with the Inspector (IR13.109), the Secretary of State concludes overall that harm would arise from the Green Belt considerations and also due to the impact on landscape and ecology.

44. Turning to the benefits offered by the appeal scheme, like the Inspector (IR13.110), the Secretary of State weighs in the scheme's favour the country park, the improvements to footpaths and bridleways, the provision of a bypass to Park Street and Frogmore, the predicted reduction of CO_2 emissions, and the employment benefits. The Secretary of State has had regard to the Inspector's comments at IR13.111 and, also bearing in mind his remarks at paragraph 31 above, he shares the Inspector's view that the need for SRFIs to serve London and the South East is a material consideration of very considerable weight.

45. The Secretary of State agrees with the Inspector's analysis at IR13.112 – 13.115. He agrees with the Inspector that the assessment of alternative locations for an SRFI conducted by the appellant has been sufficiently methodical and robust to indicate that there are no other sites in the north west area of search which would be likely to come forward in the foreseeable future which would cause less harm to the Green Belt (IR13.114).

46. For the reasons given by the Inspector at IR13.116 – 13.117, the Secretary of State agrees with the Inspector that there is no reason to conclude that determination of the proposal would be premature (IR13.117).

Conditions & Obligations

47. Having had regard to the proposed conditions set out at annex A of the Inspector's Report the Inspector's comments on conditions (IR12.1 – 12.19) and the parties' further representations on conditions, the Secretary of State is satisfied that proposed conditions 1-32 are reasonable and necessary, and meet the tests set out at paragraph 206 the Framework.

48. In his letter of 20 December 2013, the Secretary of State invited you to provide him with a planning obligation under section 106 of the Town and Country Planning Act 1990 which binds all those with an interest in the appeal site. On 20 December 2013 Hogan Lovells LLP submitted a Unilateral Undertaking dated 19 December 2013 and, as set out above, the Secretary of State gave parties the opportunity to comment on that document. The Secretary of State has given very careful consideration to the comments made including the concerns raised by the Council and the comments submitted on behalf of the appellant in respect of those concerns.

49. The Secretary of State takes the view that the 2013 obligation includes the same or substantially similar covenants as those within the 2009 obligation (evidence document 9/HS/INQ/11.0). Notwithstanding the provisions in the 2013 obligation that Hertfordshire County Council shall give reasonable assistance to the Council in respect of its fourth, sixth and seventh covenants, the Council has advised that it lacks expertise or power in respect of some measures in the obligation. The Secretary of State, however, sees little reason to anticipate that Hertfordshire County Council would not provide such reasonable assistance as might be required by the Council to ensure that the relevant covenants would meet their aims and indeed it would be against Hertfordshire County Council's own interests and responsibilities as highways authority not to provide that reasonable assistance. In any event, the Secretary of State takes the view that it is more likely that a developer would need to have control over all of the areas of the land which are required for the development including the land currently owned by Hertfordshire County Council in order to deliver the appeal scheme to which this decision letter relates. The Secretary of State has considered whether this is a case where there are no prospects at all of the development starting within the time limit imposed by the permission and he is satisfied that this is not such a case.

50. With regard to the points made by parties as to whether the costs set out in the 2013 obligation are adequate, as previously indicated, the Secretary of State considers them to be so.

51. In conclusion on this matter the Secretary of State considers that, as sought by his letter of 20 December 2012, the Unilateral Undertaking dated 2013 is a duly certified, signed and dated planning obligation which complies with the relevant statutory provisions of sections 106 and 106A of the Town and Country Planning Act 1990 and the CIL regulations 2010 as amended. He considers that the 2013 obligation binds that part of the land which was not bound by the 2009 obligation and that the entire site is now bound to necessary and sufficient planning obligations.

Conclusion

52. In conclusion, the Secretary of State has found that the appeal proposal would be inappropriate development in the Green Belt and that, in addition, it would cause further harm through loss of openness and significant encroachment into the countryside. In addition the scheme would contribute to urban sprawl and it would cause some harm to the setting of St Albans. The Secretary of State has attributed substantial weight to the harm that would be caused to the Green Belt. In addition he has found that harms would also arise from the scheme's adverse effects on landscape and on ecology and that the scheme conflicts with LP policies 104 and 106 in those respects.

53. The Secretary of State considers that the factors weighing in favour of the appeal include the need for SRFIs to serve London and the South East, to which he has attributed very considerable weight, and the lack of more appropriate alternative locations for an SRFI in the north west sector which would cause less harm to the Green Belt. He has also taken account of the local benefits of the proposals for a country park, improvements to footpaths and bridleways and the Park Street and Frogmore bypass. The Secretary of State considers that these considerations, taken together, clearly outweigh the harm to the Green Belt and the other harms he has identified including the harm in relation to landscape and ecology and amount to very special circumstances. Despite the Secretary of State's conclusion that the scheme gives rise to conflict with LP policies 104 and 106, in the light of his finding that very special circumstances exist in

this case he is satisfied that, overall the scheme is in overall accordance with the development plan.

Formal Decision

54. Accordingly, for the reasons given above, the Secretary of State agrees with the Inspector's recommendation. He hereby allows your client's appeal and grants outline planning permission for the construction of a Strategic Rail Freight Interchange comprising an intermodal terminal and rail and road served distribution units (331,665m^2 in Use Class B8 including ancillary B1/B2 floorspace) within Area 1, with associated road, rail and other infrastructure facilities and works within Areas 1 and 2, (including earth mounds and a Park Street/Frogmore relief road) in a landscaped setting, and further landscaping and other works within Areas 3 to 8 inclusive to provide publicly accessible open land and community forest, at land in and around Former Aerodrome, North Orbital Road, Upper Colne Valley, Hertfordshire in accordance with application Ref 5/09/0708 dated 9 April 2009, subject to the conditions set out at Annex B.

55. An applicant for any consent, agreement or approval required by a condition of this permission for agreement of reserved matters has a statutory right of appeal to the Secretary of State if consent, agreement or approval is refused or granted conditionally or if the Local Planning Authority fail to give notice of their decision within the prescribed period.

56. This letter does not convey any approval or consent which may be required under any enactment, bye-law, order or regulation other than section 57 of the Town and Country Planning Act 1990.

57. This letter serves as the Secretary of State's statement under regulation 21(2) of the Town and Country (Environmental Impact Assessment) (England and Wales) Regulations 1999.

Right to challenge the decision

58. A separate note is attached setting out the circumstances in which the validity of the Secretary of State's decision may be challenged by making an application to the High Court within six weeks from the date of this letter.

59. A copy of this letter has been sent to St Albans City and District Council and to STRIFE. Notification letters have been sent to all other parties who asked to be informed of the decision.

Christine Symes
Authorised by the Secretary of State to sign in that behalf

Appendix 4 – Key Relevant Inspectors Reports and Decision Letters extracts

b. Radlett 2010 Inspector's Conclusions

Report to the Secretary of State for Communities and Local Government

by A Mead BSc (Hons) MRTPI MIQ

an Inspector appointed by the Secretary of State for Communities and Local Government

The Planning Inspectorate
Temple Quay House
2 The Square
Temple Quay
Bristol BS1 6PN
☎ GTN 1371 8000

Date: 19 March 2010

Land in and around former aerodrome, North Orbital Road, Upper Colne Valley, St Albans

St Albans District Council

Town and Country Planning Act 1990

Section 78 Appeal by Helioslough Ltd

Proposed Strategic Rail Freight Interchange

Inquiry held between 24 November – 18 December 2009

Site in and around Former Aerodrome, North Orbital Road, Upper Colne Valley, St Albans, Hertfordshire

File Ref: APP/B1930/A/09/2109433

CONTENTS

13. Conclusions

[The numbers in square brackets refer to the source paragraphs in the report]

Introduction

13.1 The proposal is to build a Strategic Rail Freight Interchange (SRFI) with a rail link to the adjoining Midland Main Line (MML) and with road access onto the A414 dual carriageway, which then leads to the M10, the A405 and the M25. The appeal site lies within the Metropolitan Green Belt about 3.5km from the centre of St Albans and in a gap between the built up areas of London Colney, Colney Street and Park Street/Frogmore.

13.2 The entire scheme comprises eight separate parcels of land (Areas 1 to 8), with the main body of the SRFI and connecting roadways being on Area 1 (146ha), which is mostly restored mineral workings, following its former use as Radlett Aerodrome. Area 2 (26ha) would accommodate the rail link to the MML. Areas 3 to 8 would generally remain in agricultural and woodland use with improved public access and some areas given over to more formal recreational uses. The description of the proposal includes these areas of land as a country park. The scheme would also include a bypass along the western edge of the site which would link the A5183 to the A414 around the build up areas of Park Street and Frogmore. [2.2 – 2.18, 4.1 – 4.19]

13.3 The application is in outline with details of siting, means of access and landscaping to be considered as part of the application to the extent that these matters are defined and described in the Development Specification. The development on Area 1 would include 331,665m^2 of buildings most which would be warehousing up to 20m in height, together with ancillary vehicle maintenance units and a recycling centre. [1.8, 4.2]

The Previous Appeal

13.4 In October 2008, following a public inquiry, the Secretary of State dismissed an appeal against a refused application for an identical proposal on the same site. The overall conclusions of the Secretary of State were that the proposal did not comply with the development plan as it was inappropriate development in the Green Belt, and that it would also cause substantial further harm to the Green Belt. She also identified limited harm from conflicts with the development plan in relation to landscape and visual impact and highways, but considered these would be insufficient on their own to justify refusing planning permission. [3.5 – 3.30]

13.5 The Secretary of State was not satisfied that the appellant had demonstrated that no other sites would come forward to meet the need for further SRFIs to serve London and the South East, and she was unable to conclude that the harm to the Green Belt would be outweighed by the need to develop an SRFI at Radlett and that this was therefore a consideration amounting to very special circumstances. Having balanced the benefits of the proposal against the harm to the Green Belt, she also concluded the benefits of the proposal taken either individually or cumulatively would not clearly outweigh the harm to the Green Belt and did not constitute very special circumstances.

13.6 The Secretary of State therefore concluded that there were no material considerations of sufficient weight which required her to determine the application other than in accordance with the development plan. She then dismissed the appeal.

Environmental Statement

13.7 An Environmental Statement (ES) was submitted in accordance with the 1999 Regulations, as amended. In my opinion, the ES meets the requirements of the 1999 Regulations, and I have taken its contents into account in arriving at the recommendation in this report, together with all the other environmental information considered at the inquiry and submitted in connection with the appeal.

Legal Submissions[592]

13.8 All three legally represented parties at the inquiry, the appellants, the Council and STRIFE made references in opening and closing submissions about how the current case should be approached in view of the previous decision on the appeal site by the Secretary of State. [7.4 – 7.14; 8.2 – 8.15; 9.3 – 9.9]

13.9 The stance of the Council and STRIFE was that there is no duty to decide a case in the same way as the previous decision and that, whilst previous relevant decisions should be taken into account and dealt with adequately, an Inspector (or Secretary of State) has to exercise his/her own judgement and is free to disagree with the earlier decision. This has been set out in the Planning Encyclopaedia (P70.38) where references are made to judgements in the cases of *North Wiltshire District Council v. Secretary of State for the Environment [1992] J.P.L. 955; Rockhold v. Secretary of State for the Environment [1986] J.P.L. 130; Barnet London Borough Council v. Secretary of* State *for the Environment [1992] J.P.L. 540 and R. v. Secretary of State for the Environment, ex p. Gosport Borough Council [1992] J.P.L. 476*. [8.5, 9.6]

13.10 As a result of reviewing the judgements, the Council submitted that (a) the decision-maker on a fresh application is considering the application as a new application; (b) the decision maker should reach a conclusion taking into account all relevant matters, including any previous decision of relevance; (c) the need to establish a "good reason" for a change of mind from an earlier decision applies where the later decision, if decided in a particular way, would be inconsistent with the previous decision; (d) what will amount to a "good reason" is not a closed list; and (e) a good reason may be a change of circumstances, but need not be that; (f) the decision maker decides that the balance should be struck in a different way and (g) a new argument or a new piece of evidence or the compelling nature of the way the evidence is presented may also amount to a good reason. [8.7]

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[592] At the inquiry, I was formally requested by Mrs Anne Main MP to issue a witness summons against an employee of Network Rail in order to compel that person to attend the inquiry to be cross examined. Notwithstanding the submissions by the appellant that a witness summonsed in that way would be there to give evidence rather than answer questions, after I indicated that the person initiating the summons would be responsible for meeting the expenses incurred by the witness, and taking into account the willingness of Network Rail to supply written answers to questions which had been put collectively by the main parties earlier in the inquiry and were awaited the following day, I declined the request. The matter was not pursued further and after receipt of the answers from Network Rail, no more questions were put to that body.

13.11 The appellants stated that the previous decision letter should be the starting point for this appeal and that clear guidance is thus given as to what is required to be addressed in order to secure permission. The reasons given for refusing permission should *"enable disappointed developers to assess their prospects of obtaining some alternative development permission"*: per Lord Brown in *South Bucks DC v. Porter (No.2)* [2004] 1 WLR 1953 at [36] or, by analogy and in the context of this case, should enable disappointed developers to know what they need to do to overcome the problems identified with their proposals. The Secretary of State here has told the appellant company what it needs to do in order to secure a planning permission. The appellant stated that it would be plainly unfair, inconsistent and unreasonable for the Secretary of State to subsequently move the goalposts. [7.4, 9.4]

13.12 This basic proposition applies both to consistency in treatment of different people and to consistency in treatment of the same person at different times: see *R (oao Kings Cross Railway Lands Group) v. Camden LBC [2007] EWHC 1515 (Admin):* "*… However, given the desirability of in principle (to put it no higher) of consistency in decision making by local planning authorities, Mr Hobson rightly accepted that in practice the Committee in November 2006 would have to have a "good planning reason" for changing its mind. That is simply a reflection of the practical realities. If a local planning authority which has decided only eight months previously, following extensive consultations and very detailed consideration, that planning permission should be granted is unable to give a good and, I would say, a very good planning reason for changing its mind, it will probably face an appeal, at which it will be unsuccessful, following which it may well be ordered to pay costs on the basis that its change of mind (for no good planning reason) was unreasonable".* PPS1 paras 7 and 8 also emphasise the need for consistency. (Inspector's emphasis) [7.6, 8.6]

13.13 The appellants accepted that the Secretary of State was legally entitled to come to a different conclusion to that previously reached, but unless there were any material changes in circumstances (MCCs) there could be no rational reason for him to do so and would be inconsistent with paragraph B29 of Circular 3/2009. However, in my opinion, the *Kings Cross Railway Lands Group* judgement above supports the submission of the Council that a good reason may be sufficient for the decision maker to come to a decision which is inconsistent with one made earlier. Indeed, I would suggest that the phrase within the *Kings Cross Railway Lands Group* judgement indicating *"a very good planning reason"* describes the appropriate test for a change of mind. Therefore, in my opinion, it follows that, in relation to the current appeal, the point can be applied to either the Secretary of State, Inspector or Council and that an MCC need not be the sole reason for a conclusion or decision to differ from one made previously. [7.10]

13.14 This opinion is reinforced by a quote from the case of *North Wiltshire District Council v. Secretary of State for the Environment [1992] J.P.L. 955*: *"To state that like cases should be decided alike presupposed that the earlier case was alike and was not distinguishable in some relevant respect. If it was distinguishable then it usually would lack materiality by reference to consistency although it might be material in some other way. Where it was indistinguishable then ordinarily it had to be a material consideration. A practical test for the Inspector was to ask himself whether, if he (the Inspector) decided this case in a particular way was he necessarily agreeing or disagreeing with some critical aspect of the decision in the*

previous case? The areas for possible agreement or disagreement could not be defined but they would include interpretation of policies, aesthetic judgments and assessment of need. Where there was disagreement then the Inspector had to weigh the previous decision and give his reasons for departure from it. These could on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they might have to be elaborate" (Mann LJ). Therefore, the Inspector was not precluded from disagreeing with some critical aspect of a case indistinguishable from a decision in a previous case, only that reasons had to be given.

13.15 However, the Council also submitted "…simply … a change of view…" was a sufficiently good reason for a decision maker to come to a different decision. I consider that this is far too simplistic. A mere change of view or opinion which then resulted in a different decision, would have to be supported by an adequate chain of logic, otherwise it would be too easy for that decision to appear unsound. Accordingly, whereas I agree that an MCC could result in a different conclusion or decision, such a change could also be prompted by another "very good planning reason". [8.7]

13.16 Therefore, following the findings in the *Kings Cross Railway Lands Group* case, whereas for reasons of consistency I accept that identical cases should be decided alike, I consider that neither I nor the Secretary of State are bound to follow either the conclusions of the previous Inspector or the decision provided that there are very good planning reasons, which are clearly explained, why such disagreement has occurred.

13.17 I note that the Council deliberately stepped back from arguing against certain conclusions by the previous Inspector and Secretary of State because of the "threat" of costs which had been made if it had pursued various issues without identifying a change in circumstances. The Council did not agree with the contention that costs would apply in such circumstances, but felt incumbent to limit the costs exposure as a result of the points made at the PIM.

13.18 However, at the inquiry, neither the Council, nor any other party, was prevented from calling any evidence to support its case, which was consistent with what I advised at the PIM, notwithstanding the comments I made about the risk of unreasonableness in relation to paragraph B29 of Circular 3/2009. It seems to me that, if the Council elected not to present evidence on an issue and that decision was based on a consideration of an award of costs being made against it, there is a tacit admission of possible unreasonableness and a recognition that a very good planning reason for challenging a particular previous conclusion of the Secretary of State might not exist. [7.12]

13.19 Therefore, in my opinion, the Secretary of State may consider that, if there is a very good planning reason, he is able to differ from the conclusions or decision of his predecessor.

Main Considerations

13.20 Accordingly, after hearing the evidence at the inquiry, reading the written representations and inspecting the site and surroundings, including the alternative sites shortlisted by the appellant, I believe that the main considerations in the case,

having regard to the aims of the adopted planning policies for the area and the previous decision of the Secretary State are:

(a) the extent to which the proposal would result in harm to the openness of the Green Belt and the purposes of including land within the Green Belt;

(b) the extent to which the proposal would cause other harm;

(c) whether other considerations clearly outweigh the totality of any harm identified;

(d) and, if they do, whether the circumstances of the case are very special and justify granting permission.

The Development Plan

13.21 **The East of England Plan** (RSS) published in 2008 includes Policies T1 and T10 to which references have been made in the reasons for refusal of the planning application. Policy T1 describes regional transport strategy objectives and also the outcomes which should arise if those objectives are successfully achieved. An objective of the policy is to manage travel behaviour and the demand for transport to reduce the rate of traffic growth and greenhouse gas emissions. This could lead to an increased proportion of freight movement by rail and safe, efficient and sustainable movements between homes, workplaces etc. [5.2]

13.22 Policy T10 provides that priority should be given to the efficient and sustainable movement of freight, maximising the proportion of freight carried by e.g. rail including that: *"provision should be made for at least one strategic rail freight interchange at locations with good access to strategic rail routes and the strategic highway network, unless more suitable locations are identified within London or the South East for all three to four interchanges required to serve the Greater South East".* [5.3]

13.23 Para 7.25 of the Plan states that *"Currently, the movement of freight in the region is largely by road. To increase movements by rail... there is a need for interchange locations. The 2004 Strategic Rail Authority Strategic Rail Freight Interchange Policy identified a need for three to four strategic rail freight interchanges for the Greater South East and the 2006 Eastern Regional Planning Assessment for the Railway envisaged development of strategic sites around the M25. Given that the region includes a third of the M25 ring and that all the main rail lines from London to the North and Scotland cross the M25 within the East of England it is likely that at least one of the required strategic interchanges will need to be in the region."*

13.24 **The South East Plan** was published in 2009. The appeal site is not within the South East for the purposes of the Plan and so is not part of the development plan for the area. However, Policy T13 deals with Intermodal Interchanges and seeks the provision within the region of up to three intermodal interchange facilities well related to rail and road corridors capable of accommodating the anticipated level of freight movements, the proposed markets and London. [5.7]

13.25 Potential sites should meet a number of criteria such as being of sufficient size, have rail connectivity, the potential for adequate road access and be situated away from incompatible land uses. The Plan states that suitable sites are likely to be located where the key rail and road radials intersect with the M25.

13.26 There are no saved policies in the **Hertfordshire County Council Structure Plan Review 1991 – 2011** which are relevant to the current proposals. [5.4]

13.27 **The St Albans District Plan Review 1994** includes Policies 1, 97, 104, 106 and 143. Policy 1 deals with the Metropolitan Green Belt and describes the circumstances in which planning permission might be granted for certain types of development, none of which include an SRFI. Policy 97 seeks to safeguard footpaths, bridleways and cycleways. Policy 104 aims to preserve and enhance the quality of the landscape throughout the District. Policy 106 provides for taking account of ecological factors when considering planning applications. Policy 143 provides for visual and ecological improvements in the Upper Colne Valley and encourages measures to promote the enjoyment of the countryside. [5.5]

13.28 No policies in the **Minerals Local Plan** or the **Waste Local Plan** are referred to in the reasons for refusal. An Issues and Options Consultation paper for the **St Albans City & District Core Strategy Development Plan Document** was published in July 2009 and so the Core Strategy is at such an early stage in its preparation that I accord little weight to it. [5.6, 5.7]

Other Policies [5.7]

13.29 The London Plan Consolidated with Alterations since 2004 published in 2008 encourages the provision of SRFIs (Policy 3C.20). A New Plan for London (2009) has been published for consultation and supports the provision of SRFIs setting out features which the facilities must deliver and recognising that they can often only be located in the Green Belt.

13.30 The Strategic Rail Authority (SRA) published a Strategic Rail Freight Interchange Policy in March 1994. Although the SRA has ceased and the responsibilities for Route Utilisation Strategies (RUSs) and identifying impacts on the rail network has now transferred to Network Rail, the document is still a source of advice and guidance.

13.31 The aim of the policy is to facilitate the development of a network of commercially viable rail freight interchanges with the right facilities and in appropriate locations to support the required growth of freight on rail. Key factors in considering site allocations at the recommended scale of regional planning include suitable road and rail access, ability for 24/7 working, adequate level site area and potential for expansion, proximity to workforce, proximity to existing and potential customers, fit with the primary freight flows in the area, the ability to contribute to the national network by filling gaps and to fit with strategies promulgated by the then SRA including Freight Strategy, RUSs and Regional Planning Assessments.

13.32 The SRA policy suggests that London and the South East, as then constituted, could meet the required capacity by the provision of 3 or 4 new SRFIs in the region, supplemented by smaller locations within the M25 ring. The qualitative criteria to

deliver the capacity mean that suitable sites are likely to be located where the key road and rail radials intersect with the M25.

13.33 In 2009 the DfT published The Longer Term Vision for the Strategic Rail Network. This seeks the delivery of items including longer and heavier trains, efficient operating characteristics, a 24/7 capability, W12 loading gauge on all strategic container routes, increased freight capacity, and the development of SRFIs and terminals.

13.34 As the Council accepted in evidence, the need for SRFIs is stated and restated in a number of documents.

Green Belt

13.35 When dismissing the previous appeal for an SRFI at the site in 2008, the Secretary of State concluded that it would be inappropriate development in the Green Belt and would conflict with national and local policy. The Secretary of State agreed with the previous Inspector that, whilst the impact on the landscape of the proposal would be mitigated to some degree by the mounding and planting proposed, the proposal would have a substantial impact on the openness of the Green Belt and harm on this account could not be mitigated. The Secretary of State also concluded that the proposal would result in significant encroachment into the countryside, would contribute to urban sprawl and would cause some harm to the setting of St Albans. The appellant, the Council and STRIFE did not dissent from those conclusions which were also reflected in the representations from many members of the public. I have no reason to disagree. [7.26 – 7.36; 8.16 – 8.23; 9.15 – 9.34, 10.7, 10.10, 10.11, 10.17, 10.30]

13.36 However, the Secretary of State also concluded that the proposal would not lead to St Albans merging with Radlett, or Park Street and Frogmore merging with either Napsbury or London Colney. In taking a contrary view, the Council argued that there was no requirement for a proposal to be similar to the development to which it would be near in order to create the impression that urban forms were merging. Neither was there a requirement that the proposal should have to actually enclose the open space between two separated settlements in order to have merged. [7.28 – 7.30; 8.18 – 8.22; 9.23 – 9.31, 10.26]

13.37 In considering the issue of the merging of neighbouring towns, the previous Inspector commented that, given the areas of open land which would remain between Radlett and St Albans with the development in place, there was little merit in the contention that they would have merged. Similarly, he stated that the built up area of the SRFI would be located to the west of the Midland Main Line (MML) with open fields between the MML and Napsbury/London Colney.

13.38 The new railway line to give access to the SRFI would be built on land between the MML and Napsbury. However, an open gap would continue to exist and, although I accept that the gaps between the various settlements would be significantly eroded by the SRFI, they would not merge as a consequence of the development. New development may have been built at Frogmore, Colney Street and Napsbury Park since the previous inquiry, but they were commitments known about and assessed at that time and I do not take the view that the proposal would lead to the merging of neighbouring towns.

13.39 STRIFE submitted an appeal decision at Farnborough in which it was explained by the Inspector and endorsed by the Secretary of State that the effectiveness of a Strategic Gap could be reduced even though the distances between development and surrounding settlements increased. I not disagree with that proposition, but I do not accept that, in this appeal, the proposed development would lead to merging. The physical gaps would still remain, although I acknowledge that the SRFI would be a visually dominant feature.

13.40 The fifth purpose of including land in the Green Belt is to assist in urban regeneration by encouraging the recycling of derelict and other urban land. I do not accept that there were any strong contenders within the assessment of alternative locations for the SRFI which were at sites where derelict land or other urban land could be recycled, especially due to the need for good transport links to the motorway and rail networks and the size of site to accommodate the development which is proposed. Therefore, in this case, the aim to encourage the recycling of derelict and other urban land would not be frustrated by the proposal.

Other Harm

Landscape and Visual Impact

13.41 The Council submitted that its assessment of the landscape and visual impact of the proposal was similar to that of the previous Inspector as agreed by the Secretary of State. The landscape value of Areas 1 and 2 is high and the landscape impact of the proposals on Area 1 and at Year 15 would be "significant adverse". The landscape impact in Areas 1 and 2 would not be offset by the proposals for Areas 3 – 8. Overall, balancing all the Areas together, the Secretary of State agreed with the conclusions of the Inspector that the impact would be moderately adverse. [8.24 – 8.33; 9.126]

13.42 Whereas the Council largely agreed with the Secretary of State's assessment from the previous inquiry, it suggested that there would be additional significant impacts caused by the embankments and cuttings for the rail route. Furthermore, the scale of impact of the scheme when viewed from viewpoints on Shenley Ridge would be moderate adverse. I agree that the visibility of the warehouses when seen from wider viewpoints, including Shenley Ridge would place the impact on the landscape at moderate adverse, but this does not increase the severity of the impact as was concluded previously by the Secretary of State. Similarly, I agree that the embankments and cuttings for the new rail link would have a moderate adverse impact visually and on the landscape. Nevertheless, this would not be inconsistent with the overall conclusions of the Secretary of State on the first appeal.

13.43 In addition, although the widening of the M25 has commenced to the south of the site, I would expect that new lighting would be designed to best practice standards, with full directional cut-off lights and would not add significantly to any prominence and visual harm which would be caused by the SRFI. In any event, the Council was not seeking to rely on significant changes of circumstances to support the landscape and visual impacts of the case.

13.44 The previous Inspector and Secretary of State noted that the upper parts of the warehouses would be open to view from some higher vantage points. Advice in

PPS7 and PPS1 and emphasised in Policy ENV2 of the East of England Plan and the St Albans Local Plan Review aims to safeguard the countryside. However the guidance and the policies were in place at the time of the previous decision. The effect of the proposal on the landscape and the visual impact would be moderately adverse and would be contrary to Policy 104 of the Local Plan. Therefore I do not dissent from the previous conclusions of the Secretary of State. Neither, it appears from submissions, does the Council, albeit it claims that the effects would be unacceptable. In my opinion, the acceptability or otherwise cannot be judged until the final balance of harm and other considerations are evaluated. [7.59 – 7.60]

Ecology

13.45 In the previous decision, the Secretary of State concluded that the harm to ecological matters resulting from the proposed development would not be significant. Since then, the Council has indicated that the lapwing has been included on the UK Biodiversity Action Plan List and that the site is now defined as a County Wildlife Site (CWS) in part for its bird interest. Although the soundness of the definition is somewhat undermined by the paucity of data, the designation has been made and which attracts consideration under Policy 106 of the Local Plan. Policy 106 indicates that planning applications will be refused for proposals which adversely affect sites of wildlife importance. Therefore, the proposal is in conflict due to the harm to the CWS. [7.83 – 7.86; 8.70 – 8.81, 10.27]

13.46 Accordingly, to that extent, despite there being no more bird species recorded than there were at the time of the previous inquiry and despite the lack of objection from Natural England, I agree with the Council that more weight should be attached to the harm to ecological interests. The designation of the area of acid grassland within the appeal site as a CWS reinforces that view, although there is no reason to doubt that translocation would be successful if were to be carefully planned and executed and the harm mitigated.

Sustainability

13.47 The Council's sustainability objection to the proposal is based on the degree to which it would offend against sustainability policy given that, in the Council's opinion, it would not function as an SRFI. I shall deal with that issue below. So far as travel to work is concerned, "proximity to workforce" is one of the key factors listed by the former Strategic Rail Authority to be taken into account when selecting sites for an SRFI. [8.67 – 8.69]

13.48 In the previous decision, the Secretary of State concluded that the appeal site would perform poorly against this criterion. The Secretary of State considered the fact that only a small proportion of workers would live locally would be a disadvantage in terms of relative sustainability of the travel to work pattern of the workforce and that the site is not well placed to encourage workers to travel to it by means other than the private car. Taking the draft Travel Plan into account, the Secretary of State did not consider that it would be reasonable to refuse planning permission for the development on account of sustainability concerns relating to the likely pattern of travel to work by the workforce. I consider that there has been no sound evidence advanced which would contradict that earlier conclusion. [7.87; 9.113 – 9.114]

Highways

13.49 At the previous inquiry, the Highways Agency (HA) withdrew its objections. The concerns of the Hertfordshire CC (HCC) as highway authority were largely rejected. The Secretary of State attached limited weight to concerns about highways. In the current appeal, there were originally two reasons for refusal concerning highways, but neither were pursued at the inquiry by the local highways authority or the Highways Agency. [7.38, 7.39, 7.41, 7.42]

13.50 The approach in the Transport Assessment (TA), including trip assessment, was approved by the HA. Appropriate works would be carried out to Junctions 21A and 22 of the M25. The appellant claims that implementation of the The Freight Monitoring and Management Plan (FMMP) would result in there being no material impact on the strategic highway network. The Agreed Statement between the appellant and the HA is consistent with that conclusion. There was no objection from the highway authority at the inquiry. [7.40]

13.51 STRIFE contended that the appeal site does not enjoy the high quality road links which national policy demands. The projected 3,200 daily HGV movements would have to be all routed via the A414 to gain access to the motorway network, but the A414 is already heavily congested and the local roads become "gridlocked" whenever there is an incident on the M25 or M1. [7.43, 9.101, 10.21, 10.43]

13.52 The appellant accepts that the traffic on the A414 would increase in order to gain access to the motorways via the A405 and the A1081 and states that those roads are suitable for the HGV flows being dual carriageway, without direct access from houses, and currently carry heavy flows. The improvements to the Park Street and London Colney roundabouts would ensure that traffic congestion should be no worse, and might even improve. Following the previous inquiry, the Secretary of State concluded that the fears that the development would increase traffic congestion were generally not supported by the evidence. There has been no change to the evidence of any significance which would lead me to a different conclusion. [7.45, 10.32, 10.34]

13.53 Concerns were expressed about the risk of "gridlock" and related rat running to avoid the consequent congestion. The previous Inspector concluded that he had no reason to expect that HGV drivers would risk the fines and other penalties that should be imposed if they flout weight restrictions. A "gridlock" might well occur from time to time, but anecdotal evidence suggests they are rare and this bears out my experience of using the M25 and its supporting road network. [7.47 – 7.48; 9.102 – 9.104, 10.29]

13.54 As the appellant indicates, HGV drivers would be unlikely to leave the SRFI to join a traffic queue which is not moving. Arriving vehicles would most likely be in the queue and would just have to wait. The previous Inspector commented that traffic conditions in the area are often poor, but then concluded that, with the road improvements that would be secured by condition, congestion on the network would be no worse with the development than without. The Secretary of State agreed with the conclusions and I have no reason to disagree.

13.55 STRIFE raised the issue of trip generation and claimed that the warehouses may be 66% higher than those built at DIRFT upon which the appellant relied in

predicting the HGV movements generated by the proposal. This is because the estimate was based on floorspace and no account was taken of height and, consequently, shed capacity. The appellant has indicated that the Traffic Assessment is the same as was presented at the last inquiry. The trip generation has been robustly tested by the HA and the local highway authority. The HA has confirmed its acceptance of the trip generation and the highway authority has not attempted a reassessment. [7.50 – 7.56; 9.106- 9.107, 9.109, 10.8, 10.9, 10.28, 10.55 – 10.57]

13.56 The appellant stated that the trip generation was based on surveys at comparable locations and there is no evidence of a correlation with volume. Variables could also include actual internal racking heights and spacing, occupier, nature of operation, level of automation, density of stacking, stock turnover, the relative volume and weight of goods, the efficiency and type of the vehicles used. [7.52]

13.57 In my opinion, whether or not the DIRFT buildings are 12.5m, 18m or 20m high, the evidence submitted suggests that trip generation is more complex than a simple volumetric ratio. Whereas, if all other factors were equal, a propensity for a larger volume to result in more traffic would be a reasonable assumption, the reality appears to be far more complicated. I place greater reliance on the judgment of the HA and the local highway authority, given that neither body having chosen to challenge the trip generation forecasts. In any event, as the appellant indicates, the FMMP would restrict the HGVs in peak hours. There is no substantive evidence to support the assertion that the only occupiers of the warehouses would be major retailers or those trading in heavier goods which might lead to a higher number of HGV trips than average. [7.53]

13.58 Any impact of traffic on residential amenity because of noise or air quality should be mitigated by the provision of the Park Street bypass which would be used by traffic travelling to and from the appeal site rather than along Park Street itself. Neither the District Council nor the County Council expressed adverse comments about the effect of the Butterfly Farm development and the proposed new hotel on overall traffic flows when combined with that relating to the SRFI. Accordingly, in the face of the lack of objection from the highway authority and Highways Agency and the lack of concern expressed by the County Council about the design of the Park Street roundabout at this inquiry compared to the one previously, I do not consider that there would be any significant harm in relation to highways issues or that there would be any conflict with the development plan. [10.15, 10.19, 10.22, 10.23, 10.47, 10.48, 10.49]

Noise
[7.63 – 7.81, 8.34 – 8.58. 9.128 – 9.133, 10.41, 10.52]

13.59 Following the previous inquiry, the Secretary of State agreed with the conclusions of the Inspector on noise and noted that the expert witnesses who appeared at that inquiry agreed that increases in traffic noise which would affect those living next to the railway line or those living near main roads would not be significant. The Secretary of State considered that the condition proposed which included the limitation of night time noise to 50dB $L_{Aeq,}$ 8hr between 2300 and 0700 the following day to be reasonable and agreed with the Inspector that the noise generated by activity on the site during the night would not be unacceptable, albeit

that it would be readily perceptible to residents living in the quieter areas about the site.

13.60 In summary, the appellant submitted that there have been no material changes in circumstances on noise since the last inquiry and there is no need to revisit the conclusions of the Secretary of State. There was no error in the Inspector's approach at the last inquiry and the condition which was deemed acceptable by the Secretary of State, which is suggested at the inquiry, is unchanged.

13.61 The conclusions which the Council contend in this case should not be accepted are that the proposed condition to control noise would be achievable and that it would have the effect of adequately protecting residents, even if achievable. The Council was especially concerned with intermittent noise and L_{Amax} events. Using BS4142 as guidance, the Council estimated that noise from the development would lead to levels of exceedance of background noise by up to 20dB which would mean that complaints would be likely.

13.62 There is no new survey data at this inquiry. The appellants in supplying a written statement and in making submissions and the Council and STRIFE in the evidence of their witnesses and in submissions relied on the information gathered for the previous inquiry.

13.63 The degree of exeedance of the background noise level claimed by the Council was not directly challenged in cross examination at this inquiry and there was no evidence submitted which could be tested in order to counter the claim. However, I note that 5 dB of the excess is made up of the character correction for the tonal variations which would be caused by the irregularity of the noise and bangs and clatters. This correction was also applied by the previous Inspector, but with two reservations.

13.64 The first was that the noise from the site would be made up by contributions from many individual sources which would, to some degree, combine to create a more continuous tone, less distinguishable from traffic noise. The second reservation was that the noise sources would generally be several hundred metres from the residential properties of concern with intervening earth mounds which would have the effect of muffling individual sounds. The Inspector commented that this would result in the noise impact from the development being over-estimated.

13.65 I also note from the Environmental Statement that the property identified by the Council as receiving 20dB in excess of background would not remain in residential use with the proposed scheme. Moreover, my interpretation of the noise contours presented in Appendix 7.A8vi of the ES (2011 with scheme, night) does not show that noise levels for Rosemary Drive would exceed 60 dBA. The boundary is close, but the houses are not on the noisier side of the boundary judging from the map base. In any event, I consider that the map representation and modelling would have a degree of tolerance and the difference on the map between the noise levels in this location "with the scheme" compared to "without the scheme" are so small that the implication is that the noise levels would remain very similar, mostly because of the dominance of the nearby MML.

13.66 The Council indicated in evidence that even if the +5 dB penalty was not applied to the BS4142 rating, the difference would still range from +5 to +10 resulting in an assessment from "marginal" to "complaints likely", but the +10 dB shown is for the property described as not in residential use with the proposed scheme. Therefore, bearing in mind the reservations which I share with the previous Inspector about the use of applicability of the 5 dB tonal penalty, the probable noise levels would not necessarily be as extreme as portrayed by the Council and less than those which would make complaints likely on an 8 hour averaging basis.

13.67 The Council claimed that short duration events with higher noise levels as expressed as L_{Amax} should be used to assess the development as presented in the 2009 WHO Night Noise Guidance. Although the Council suggested that the WHO Guidance is a material change in circumstances, the appellants submitted it was available as a draft to be used at the previous inquiry and, in any event, the new guidance adopted an average yearly approach which has overtaken the emphasis on L_{Amax}.

13.68 It was accepted by the previous Inspector, following the Statement of Common Ground for the earlier inquiry, that rail noise would be unlikely to constitute a significant impact. In addition, there is no substantive evidence to suggest that flange squeal would be an issue for the rail radii which are proposed. Construction noise could be controlled under the Control of Pollution Act as agreed at the previous inquiry. [10.33]

13.69 The appellant suggested two conditions which could be imposed which are consistent with those discussed and agreed at the last inquiry. One deals with the submission of a scheme, the other would set a noise level of 50dB $L_{Aeq, 8hr}$ between 2300 and 0700. The Secretary of State agreed with the Inspector at the previous inquiry that these proposed conditions would be reasonable.

13.70 The Council has submitted that this condition would provide insufficient protection for residents due to the lack of control on loud noises which would exceed the 50dB threshold, but be of short duration. A limited number of such noises could be enabled by the proposed condition where the time for consideration is for 8 hours with the averaging process. The Council suggested a further condition based on L_{Amax} and, although the appellants resisted such a condition at the inquiry, I consider that it is essential in order to protect the living conditions of nearby residents.

13.71 Therefore, subject to the inclusion of the three conditions on noise which are recommended should the appeal be allowed, I am satisfied that the noise generated by the activity on the site during the night would not be unacceptable, albeit it would be noticeable to residents living in the quieter areas around the site. On that basis, the noise from the development would not bring the proposal into conflict with the development plan.

Additional Matters

13.72 The reason for refusal based on air quality was not pursued at the inquiry and I agree with the appellant that the living conditions along Park Street should improve because of the proposed bypass, rather than deteriorate.

13.73 The Secretary of State previously concluded that lighting on the site would not result in unacceptable sky glow or materially detract from the character or amenity of nearby residents living in Napsbury Park. I have not read or heard any convincing evidence which would constitute a very good planning reason for me to differ from that conclusion. Therefore, I do not consider that air quality or lighting issues would bring the proposal into conflict with the development plan.

13.74 Similarly, as the Secretary of State previously concluded, I consider that the impact of the proposed development on Park Street and Frogmore would be beneficial due to the construction of the Park Street bypass and the consequent traffic reduction through Park Street and Frogmore. The character and appearance of the Napsbury Conservation Area would still be preserved because of its distance from the scheme.

13.75 So far as footpaths and bridleways are concerned, the need for one bridleway and one footpath to be diverted to accommodate development on Areas 1 and 2 have to be balanced against the proposals by the appellant for new routes, footpaths and bridleways and also footpath improvements outside the site. The Secretary of State considered that, overall, the harm to the existing footpaths and bridleways would be outweighed by the appellant's proposals for improvements. I have no good planning reason to differ from that conclusion.

Other considerations

Whether the development would operate as an SRFI?
[6.1, 7.100 – 7.138; 8.84 – 8.148; 9.52 – 9.116, 10.1 – 10.6, 10.10, 10.14, 10.16, 10.24 – 10.25, 10.45, 10.53, 10.54, 11.1 – 11.6]

13.76 The Council submitted that there would be no rail movements in or out of the site between 0600 and 2200; it would receive no channel tunnel traffic until the gauge has been enhanced to W9; it is in a poor location to compete with rail from the primary deep sea ports; it has poor accessibility to the primary rail route for competing with the road based domestic market, the west coast mainline (WCML); it requires a rail subsidy and gauge enhancement to assist with its competitiveness which would be insufficient in the circumstances; and any doubt should be resolved against the proposal since the need to 2015 is currently capable of being met by other developments.

13.77 The appellant claimed that there are adequate paths on the MML and that no party contends to the contrary and I agree that generally this is the case. Indeed Network Rail stated that between 0900 and 1600 two freight paths per hour in each direction are provisionally allocated to existing freight customers, and not all are currently used. Further capacity is available at night. The rail dispute between the main parties primarily centred on access to and egress from the site. I note that, at the previous inquiry, the Inspector concluded that sufficient freight train paths were then currently available to serve the SRFI facility, but that the detail of whether the paths enabled access to the site was not tested.

13.78 The Council emphasised that the 2015 Thameslink service would prevent trains from crossing into the site between 0600 and 2200, but that claim is based on the details of timetabling implementation yet to be confirmed. There was conflicting evidence about the number of First Capital Connect (FCC) trains which would run on

the MML past the site, whether 8, 10 or 12. Indeed it appears as though the number of FCC trains to run past the site has increased from 6 as stated in July 2009 to 10 as claimed at the inquiry. Although assumptions were made by the Council at the inquiry about matters including dwell times at stations, the headways, the signalling arrangements and possible junction layouts, it is quite apparent that variables such as the degree of investment in junctions and the performance of new rolling stock for Thameslink in reducing dwell time would influence the timetabling outcomes.

13.79 The timetabling process would enable negotiations to be conducted between those who would wish to run services, both passenger and freight, and the regulatory authorities until the timetable becomes firm. Network Rail does not consider that there are any major technical obstacles to achieving a connection such as is proposed at the site. They can offer no guarantee that the currently available paths will be available in the future because they are open to all licensed freight operators. All paths required for the SRFI would need to be bid for and are subject to the industry wide timetable planning process.

13.80 Network Rail function as guardians of the UK rail network and as concluded by the Secretary of State in the previous decision, I attach weight to assurances given by them and to their commitment to adopt best working practices to regulate freight train access onto busy main lines. Network Rail has stated that the SRFI would enable both the growth of rail freight and mode shift from road to rail which it considers entirely consistent with Government and Network Rail objectives and that it does not consider there to have been any material changes in the capabilities of the rail network since 2007. Therefore, on that basis, I consider that the timetabling and bidding process should ensure that sufficient paths to enable access to be gained would be made available to serve the SRFI during the interpeak hours and overnight.

13.81 Turning to gauging, in order for the development to act as an SRFI, it must be capable of being accessed by wagons carrying containers from around the UK, from the deep sea ports and from the Channel Tunnel. Subject to the appeal being allowed, the conditions would provide for gauge enhancement works. There is no reason to suppose that, pending gauge enhancements, the services would be uneconomic and require subsidy. However, these are commercial considerations rather than those relating to land use. The Council also stated that the proposal was not at an advanced stage in Network Rail's Guide to Railway Investments Projects (GRIP) system which manages investment schemes, but that is an internal NR evaluation method and not part of the planning process.

13.82 The appellant also states in evidence that the enhancement works would provide for a W10 gauge link to the Haven and north Thames side ports and the West Coast Main Line, a W9 gauge link to the Channel Tunnel via Acton and Kew, and a W8 gauge link to Southampton and Thamesport. Should W10 gauge enhancement be delivered in due course along the Great Western Main Line, this would create a W10 gauge link from Radlett to Southampton via Acton and Reading. Network Rail does not consider there to be any major technical obstacles to achieving enhancement works to W10 gauge into London. Moreover, as the appellant indicates, the works to deliver Thameslink would also create an opportunity for those engineering works to be carried out. Therefore, I do not doubt the ability of the SRFI to be accessed from all the key destinations.

13.83 The MML has been identified as part of the Strategic Freight Network of trunk freight routes with its attendant eventual upgrading to continental standards. Therefore, I have no doubt that the MML will develop as a key part of the rail freight network and that the aim of Network Rail and rail regulators will be to enable freight to be carried efficiently, albeit without compromising its passenger carrying ability.

Alternatives
[7.168 – 7.257; 8.149 – 8.253; 9.117 – 9.134, 10.31, 10.50, 10.51, 11.7 – 11.14, 11.15 – 11.22]

The North West Sector

13.84 In the consideration of the Alternative Sites Assessment following the previous inquiry, the Secretary of State concluded, in the circumstances of that case, that it was sensible and pragmatic to restrict the search for alternative sites for an SRFI at Radlett to broadly the north west sector studied by the appellant. The Council sought to dismiss the concept of there being a north west sector for SRFI purposes, commenting that the analysis which led the previous Inspector to conclude on the appropriateness of the north west sector which was endorsed by the Secretary of State, was based on lorry mileage benefits that would derive from locating an SRFI in one part of London as opposed to another.

13.85 I also note that the previous Inspector concluded that there was no policy support in the SRAs SRFI Policy or elsewhere for limiting the search in this way. However, I share his doubts that an SRFI at London Gateway could efficiently serve development to the west of London. This view is emphasised in the SRFI Policy statement of March 2004 by the SRA that the location of interchange facilities in relation to ultimate journey origin or destination is critical in making the rail option attractive to business customers. Furthermore, London Gateway was proposed on the basis of being a ship to shore facility. I am not aware of any evidence to suggest there is road and rail capacity sufficient for it to act as an SRFI in addition to a port complex, despite the reported comments from the developers that the site could be available for such a function.

13.86 The SRA policy further states that the required capacity for rail freight growth in the London and the South East would be met by 3 or 4 new SRFIs in the region, supplemented by smaller locations within the M25 ring. In addition, the policy states that qualitative criteria to deliver the capacity mean that suitable sites are likely to be located where the key rail and road radials intersect with the M25. Therefore, I consider that the policy statements indicate that SRFIs serving London and the South East would not normally be located closer to London than the M25 and that the optimum locations are on the intersections of the M25 with key rail and road routes into and out of London.

13.87 As indicated in the East of England Plan, given that the region includes a third of the M25 ring and that all the main rail lines from London to the North and Scotland cross the M25 within the East of England it is likely that at least one of the required strategic interchanges will need to be in the region. The main rail lines referred to are the East Coast Main Line (ECML), the Midlands Main Line (MML) and the West Coast Main Line (WCML), all of which are in the north west sector as described by the appellant and which gives further credence to the concept of there being a north west sector for the purposes of the assessment of alternatives.

13.88 The Council advanced an argument based on a market approach which suggested that the north west sector is not a primary distribution area of those likely to be occupying an SRFI. Nevertheless, as also indicated in the Council's evidence, much locational decision making remains fairly intuitive and I consider that, like the Inspector at the previous inquiry, restricting the assessment of alternative sites for an SRFI at Radlett to the north west sector is sensible and pragmatic, especially in view of the SRFI which has been permitted at Howbury Park in the London Borough of Bexley even if London Gateway were to operate as an SRFI. It does not seem credible to envisage a small cluster of SRFIs to serve London and the South East all in the same general location. The Council accepted that the degree of spread of accessibility is a material consideration and I consider that the broad approach of the appellant in focusing on the north west sector in the assessment of alternatives is reasonable.

Selection Criteria

13.89 The appellant was criticised for excluding sites which were regarded as unavailable due to being allocated for housing or being existing employment land. However, I consider that the suggestion that an SRFI could be sited on land allocated for housing is unrealistic. Not only would the residential allocation have to relocated elsewhere within a region where housing land is scarce, even if property values were sufficiently compatible to enable this displacement, but the SRFI could find itself embedded within a "nest" of surrounding houses which would not be consistent with the need to reduce harm to adjoining properties. Therefore, I support the approach of the appellant in discarding areas which have been allocated for housing purposes. Similarly, I consider the notion of including employment land as a potential SRFI site is unrealistic. Such land would have issues of availability and land assemblage and the need to seek alternative premises for those uses which would be displaced by the SRFI.

13.90 Parameters used to identify a "long list" of sites were: a 40ha minimum site area; being located within 5km of rail infrastructure and being located within 5km of a motorway junction or Class A road. A criticism of the assessment by the Council was the exclusion of possible sites beyond 5km from a railway line. However, I agree with the appellant that a realistic judgement has to be made about distance, taking into account the terrain through which any rail connection would have to be made and so I do not support the points made by the Council.

13.91 The Council has repeatedly suggested that the assessment is flawed due to the appellant seeking to add further information during the inquiry. Nevertheless, I consider that the appellant was merely responding to comments made and i``t would have been even more open to criticism had it failed to respond. In my opinion, the general approach by the appellant to the assessment of alternatives and producing the "long list" has been robust and realistically pragmatic.

13.92 The appellant used topography, rail connection, road access and availability to assess the long list sites. Sites within an AONB or an SSSI were excluded. The Council claimed that sites very close to others (duplicated sites) were inappropriately discarded, but I do not agree. I consider that it would have been unnecessary to examine all possible sites within a general area where that particular location was

subject to a dominant constraint which applied to the selected site. Furthermore, I agree that it was sound to use the AONB and SSSI status of land as hard constraints.

13.93 The availability criterion was questioned by the Council, but given the unlikelihood of employment land in areas such as Slough being released or strategic housing allocations such as in Wokingham becoming superfluous, I consider that the appellant is being realistic. Similarly, I have no issue with the way in which the appellant has applied the criteria of rail connection, where there was no substantive dispute about which sites were excluded, and road access. Denham Aerodrome was an exception, but was rejected for a combination of reasons of road and rail connectivity and availability.

13.94 The Council commented that there was no consideration of landscaping or other harm during the long list stage in respect of any of the sites but, as stated by the previous Inspector, it is often very easy for those who are critical of a proposal to expose flaws in any study of alternative sites carried out by a promoter of a scheme, given the vast amount of data that needs to be collected and analysed. The appellant has used a methodology which is transparent and has undertaken sensitivity tests to illustrate that considering areas greater than 5km distance from a railway line makes no difference to the result and that there are no suitable sites in the area around to the M3 motorway.

The Short List

13.95 The appellant's short listed sites comprised the appeal site and four others: Upper Sundon, Littlewick Green, Harlington and Colnbrook. There was no suggestion by any party at the inquiry that **Upper Sundon** scored better than the appeal site and I have no reason to disagree. Although the assessment by the Council found that **Littlewick Green** and Colnbrook performed better than the appeal site, I consider that the former site, west of Maidenhead is relatively poorly located to serve London. The appellant claimed that an SRFI here would have a significant adverse effect on the landscape, have an adverse impact on the setting of the conservation area to the north, cause possible harm to local residents due to noise and could have adverse effects on archaeological interests, as well as being located within the Green Belt. I agree and I do not consider that it performs overall markedly better than Radlett.

13.96 **Harlington**, north of Luton, located close to the M1 motorway and adjacent to the Midland Main Line (MML), was the subject of a planning application for an SRFI in 2008, albeit the application was subsequently withdrawn. The Council did not claim that Harlington outperformed Radlett in its assessment of alternatives. The appellant claimed that Radlett would perform better than Harlington due to the latter being significantly further from London, the difficulty of making a rail connection and the unlikelihood of providing any additional planning benefits.

13.97 The rail connection at Harlington would enable links to be made in both a northerly and southerly direction, unlike Radlett, at which it is currently proposed to link only to the south. The connections would be made to the fast tracks, albeit with significant engineering works, but I do not consider that the disadvantages would be so great that the comparison with Radlett would significantly suffer. Like Radlett, the site is within the Green Belt. However, in my opinion, Harlington would be very

prominent when seen from the AONB to the south and would have a greater visual impact on the open countryside than Radlett.

13.98 Some of the comparators between the sites would perform similarly, such as air quality, noise and archaeology. I am also not convinced that the lack of planning benefits, such as the provision of a country park of the type proposed at Radlett, weighs significantly against the Harlington site. However, I consider that the location of Harlington is inferior to Radlett as an SRFI to serve London and the South East. The greater distance along the M1, away from the M25 would reduce the versatility offered by the Harlington location compared to Radlett which virtually adjoins the M25/M1 intersection and offers significantly greater accessiblity. I realise that the appellant measured the lorry kilometre savings from the Hanger Lane Gyratory on the North Circular Road. Nevertheless, in my view, Radlett would perform more effectively as an SRFI than Harlington and that reason together with the greater adverse effect on the landscape is why I conclude that it is not a preferred alternative location, were a single SRFI required within the north west sector.

13.99 The site identified by the appellant at **Colnbrook** is also referred to as SIFE (Slough Intermodal Freight Interchange), where it is the subject of interest by developers who are promoting a scheme for an SRFI through the development plan process. The site lies between the M4 and A4 east of Slough, close to the M25 and just to the west of Heathrow. The appellant accepts that the site would be well located to serve the London market. Indeed, the site is readily accessible to the M25, M40, M4, M3 and A3, which means that it could serve a wide area including central London, the M25 West, M25 North West and M25 South West.

13.100 The appellant stated that the site would perform materially worse than Radlett in providing an SRFI due to its location in a designated Strategic Gap in the Green Belt between Slough and London, and that it would be unlikely to provide any significant planning benefits. The Strategic Gap designation is the subject of a saved policy in the Slough Local Plan and has been brought forward in the adopted Core Strategy, although I note that it is not used or applied consistently by other local planning authorities which adjoin the SIFE site, nor by St Albans District Council. Moreover, the South East Plan suggests that authorities operating gap policies will need to review them carefully to ensure that there is a continuing justification in view of the need to avoid duplication of other protection policies such as Green Belt. Nevertheless, the Strategic Gap designation is a policy to which substantial weight should be applied. In 2002, when the then Secretary of State dismissed an appeal for a freight exchange on the site (the “LIFE” proposal), he commented that seen from the elevated viewpoints east of the M25, the function of the open land to the west in helping to demarcate and separate London from Slough was clear to the Inspector.

13.101 The site is also within the Colne Valley Regional Park where regional and local policies seek to promote countryside recreation, and landscape and biodiversity enhancement. Whereas this is another policy consideration which weighs against Colnbrook in the comparison exercise with Radlett, a proposal for an SRFI could offer opportunities for improvements to the footpath and bridleway network, biodiversity and landscape in the same way that the appeal scheme is promoting a country park.

13.102 The developers of Colnbrook state that the branch line is cleared to W8 and is capable of accommodating the full range of intermodal units on standard height

platform wagons. They further state that by the time SIFE would open, all rail routes serving the site would be cleared to at least W9, probably W10, and at least one freight path per off peak hour per direction would be available to serve the site. The appellant contends that Colnbrook would not perform in a materially better way as an SRFI than the appeal site, but that is difficult to ascertain in view of the absence of evidence from the Colnbrook developer which could be tested in the inquiry. However, I have no reason to disagree with the data showing that the appeal site is closer than Colnbrook to Felixstowe and the Channel Tunnel in rail miles, although more distant from Southampton. There are conflicting views on the availability of paths in each direction on the GWML which is incapable of resolution in the absence of the opportunity to test the developer's evidence at the inquiry.

13.103 There are other comparative factors which both the appellant and developer raise in written submissions including noise, air quality, archaeology, sustainability, proximity to workforce and biodiversity, but the differences appear to be of less significance than Green Belt considerations and may well be capable of resolution should a scheme at Colnbrook be progressed to the same extent as the current proposal at Radlett. Nevertheless, due to the site being located in a Strategic Gap within the Green Belt, I agree with the appellant that it cannot be rationally concluded that Colnbrook would meet the needs for an SRFI in a less harmful way than the appeal site.

Other benefits
[7.22 – 7.24; 8.354 – 8.261, 10.18, 10.35 – 10.40]

13.104 The scheme would bring about certain local benefits, of which two were highlighted by the Secretary of State in the decision on the previous appeal. On the proposed Park Street and Frogmore bypass, the Secretary of State agreed with the previous Inspector that traffic travelling through Park Street and Frogmore on the A5183 would be reduced. She also agreed that the effect on the conservation area would be positive and that it would bring about some improvement of living conditions of residents fronting or close to the A5183. She afforded this benefit a little weight and, following the evidence heard at this inquiry, I have no good reason to disagree with her views.

13.105 With regard to the provision of the country park, the Secretary of State agreed with the previous Inspector that the proposals for Areas 3 to 8 would not deliver a "country park" in the sense that the term is generally understood, but accepted that there would be benefits to the countryside. These would include significant areas of new woodland, which would accord with the aims of the Watling Chase Community Forest Plan. New footpaths and bridleways would also be created which would facilitate circular walks and rides in the area. On ecology, the Secretary of State previously saw no reason why the proposals should not be beneficial overall and add to the existing biodiversity interest present at the site. However, with the recent definition of the CWS I now find that the proposals would be contrary to the development plan where ecology is concerned. The Secretary of State concluded that the proposals for Areas 3 to 8 would accord with the development plan and with the objectives of the Watling Chase Community Forest Plan. There has been no convincing evidence submitted to this inquiry to cause me to come to a different conclusion.

The Planning Balance including Prematurity

Green Belt

13.106 The Secretary of State previously concluded that the proposal would constitute inappropriate development in the Green Belt and she attached substantial weight to that harm. She also identified that it would further harm the Green Belt because it would cause a substantial loss of openness, significant encroachment into the countryside and would contribute to urban sprawl and she considered that the harm would be substantial. The evidence I heard at this inquiry reaffirmed those conclusions. The Secretary of State also previously concluded that limited weight should be attached to the harm to the setting of the historic city of St Albans and there is no sound reason why I should depart from those views.

Other Harm

13.107 The Secretary of State previously concluded that significant adverse landscape impacts would occur on the main SRFI site (Area 1) but that the new rail line through Area 2 would only have a marginally adverse impact. Furthermore, whereas the impact of the proposal on Areas 3 to 8 would be beneficial, the degree of improvement would not offset the harm to the landscape overall. The Secretary of State concluded that the overall impact on the entire site would be moderately adverse and, based on the evidence I have heard at this inquiry, I agree with that conclusion.

13.108 I consider that there has been no convincing evidence to justify departing from the previous conclusions of the Secretary of State concerning sustainability, air quality, lighting, conservation areas, or impact on footpaths and bridleways where either no demonstrable harm was identified or there was an overall beneficial effect. However, on ecology, I conclude that the proposal would now be in conflict with Policy 106 of the Local Plan.

13.109 In view of the lack of objection from the highway authority and the Highways Agency and the lack of concern expressed by the County Council about the design of the Park Street roundabout at this inquiry compared to the one previously, I do not consider that any significant harm would be caused by highways issues or that there would be any conflict with the development plan. Similarly, subject to the inclusion of the conditions on noise which are recommended should the appeal be allowed, I am satisfied that the noise generated by the activity on the site during the night would not bring the proposal into conflict with the development plan. Therefore, overall, I consider that harm would arise from the Green Belt considerations and also due to the impact on landscape and ecology.

Benefits

13.110 So far as benefits are concerned, those more locally site specific include the proposal by the appellant for a country park, the improvements to footpaths and bridleways and the provision of the bypass to Park Street and Frogmore. The Secretary of State previously attached “some weight” to the predicted reduction on CO_2 emissions identified in the Environmental Statement. I have no reason to disagree with that conclusion. Some weight was also afforded by the Secretary of State to the numbers of people who would work at the SRFI, albeit not necessarily living close to the site.

13.111 On a general basis, there is no dispute about the need for an SRFI. It is stated and restated in a number of documents and encouraged in PPG13 (paragraph 45). Government policies have consistently supported shifting freight from road to rail. SRA Policy (2004) suggests that 3 or 4 new SRFIs could serve London and the South East located where key road and rail radials intersect the M25. The indication in the SRA Policy that 400,000m^2 of rail connected warehousing floorspace would be needed in the South East by 2015 does not constitute a target or a ceiling. In the previous decision in 2008, the Secretary of State concluded that the need for SRFIs to serve London and the South East was a material consideration of very considerable weight. No new SRFIs have been developed since the earlier decision. Therefore, the weight has not diminished.

Alternatives

13.112 The Secretary of State also concluded that, given the site's Green Belt location, whether or not the need which the proposal seeks to meet could be met in a non-Green Belt location, or in a less harmful Green Belt location, was a material consideration in that case. I consider that is still the same position for this appeal and I also endorse the concept of assessing a possible alternative location for an SRFI in the broad sector north west of London, as previously accepted by the Secretary of State.

13.113 The Secretary of State previously indicated that had the appellant demonstrated that there were no other alternative sites for the proposal, it would almost certainly have led her to conclude that this consideration, together with the other benefits referred to, would have been capable of outweighing the harm to the Green Belt and the other harm identified. However, she considered that the appellant's Alternative Sites Assessment was materially flawed and its results to be wholly unconvincing.

13.114 In this particular case, I am satisfied that the assessment of alternative locations for an SRFI conducted by the appellant has been sufficiently methodical and robust to indicate that there are no other sites in the north west area of search which would be likely to come forward in the foreseeable future which would cause less harm to the Green Belt. The sites which I consider are the most comparable are those at Harlington and Colnbrook, both of which have schemes which are being progressed by intending developers.

13.115 At Harlington, although the harm to the Green Belt might be broadly similar to that at Radlett, I consider that the visual impact of an SRFI would be greater, and its location north of Luton, albeit easily accessible to the M1, makes it less attractive to serve London and the South East. I consider that the location of Colnbrook within the Green Belt in a Strategic Gap between Slough and London weighs heavily against preferring it to the appeal site as an alternative location for an SRFI. Nevertheless, should a scheme be developed to the same extent as the appeal proposal, it is possible that, under the challenge of evidence tested under cross examination at an inquiry, the differences between the two locations, other than the Green Belt issue would be marginal.

Prematurity
[7.88 – 7.98; 8.59 – 8.66; 9.140 – 9.146]

13.116 The Secretary of State had considered whether the previous proposal was premature in the absence of a region-wide study to establish the most suitable locations for SRFIs to serve London and the South East. She had concluded that a refusal of planning permission of the scheme on prematurity grounds would lead to a substantial delay in providing further SRFIs to serve London and the South East, contrary to the Government's declared aim of increasing the proportion of freight moved by rail. There are no signs of any substantive progress in the initiation of inter or intra regional studies on the need for and locations of SRFIs to serve London and the South East.

13.117 The Council has indicated that a National Policy Statement (NPS) including the consideration of SRFIs is due for production shortly. However, although a draft publication is imminent, there is no suggestion that the NPS will be site specific and there is no Government advice that proposals which might be influenced by the content of an NPS should be deemed premature pending its publication and subsequent designation. Consequently, I have no reason to conclude that determination of the proposal would be premature.

Overall Conclusion

13.118 Accordingly, I conclude that the proposal would constitute inappropriate development in the Green Belt which, in itself, would cause significant harm to which substantial weight should be attached. Harm would also be caused to the Green Belt because of a loss of openness, significant encroachment into the countryside and the contribution to urban sprawl. There would be an adverse effect on the setting of St Albans, although the Secretary of State concluded previously that only limited weight should be attached to this. Harm would also arise from the adverse effects on landscape and ecology. Therefore, the proposal would conflict with Policies 1, 104 and 106 of the adopted Local Plan Review.

13.119 However, other considerations including, particularly the need for SRFIs to serve London and the South East and the lack of more appropriate alternative locations for an SRFI in the north west sector which would cause less harm to the Green Belt, together with the local benefits of the proposals for a country park, improvements to footpath and bridleways in the immediate area and the provision of the Park Street and Frogmore bypass, lead me to conclude that very special circumstances exist in this case which outweigh the conflict with the development plan and therefore the appeal should be allowed subject to conditions discussed in Section 12 and attached as Annex A.

13.120 Should the Secretary of State disagree with my conclusions and recommendation, he may wish to consider the circumstances of the provision of SRFIs to the north and west of London where schemes at Harlington and Colnbrook are currently being developed. At the date of completion of the report, the proposals have not been progressed to the application stage.

Conditions

13.121 The appellant has asked the Secretary of State to note that in respect of both the conditions and the undertaking, save where necessary to reflect any change as a consequence of the Area 1 issue, or as a consequence of discussion with the HA

and Environment Agency, the conditions and undertaking remain in substantially the form they were in at the time of the previous decision. Accordingly, they represent a comprehensive and acceptable package which the Secretary of State has already decided would deliver an SRFI together with the benefits identified in the evidence.

14 Recommendation

14.1 I recommend that the appeal be allowed and planning permission be granted subject to the conditions recommended in Annex A.

A Mead

Inspector

Appendix 4 – Key Relevant Inspectors Reports and Decision Letters extracts

c. Colnbrook 2016 Decision

Department for Communities and Local Government

Simon Flisher
Barton Willmore
The Observatory
Southfleet Road
Swanscombe
Kent DA10 0DF

Our Ref: APP/J0350/A/12/2171967
Your Ref: 16347/A3

12 July 2016

Dear Sir

TOWN AND COUNTRY PLANNING ACT 1990 – SECTION 78
APPEAL BY GOODMAN LOGISTICS DEVELOPMENT (UK) LTD
LAND NORTH OF A4 (COLNBROOK BYPASS), COLNBROOK, SLOUGH SL3 0FE
APPLICATION: REF P/14961/000

1. I am directed by the Secretary of State to say that consideration has been given to the report of the Inspector, Diane Lewis BA (Hons), MCD, MA, LLM, MRTPI, who opened a public local inquiry on 8 September 2015 into your client's appeal against a decision by Slough Borough Council (the Council) to refuse outline planning permission for the construction of a rail/road freight interchange comprising an intermodal terminal and Class B8 distribution units on land north of A4 (Colnbrook Bypass), Colnbrook, Slough in accordance with application Ref P/14961/000 dated 27 September 2010.

2. On 14 March 2012, the appeal was recovered for the Secretary of State's determination, in pursuance of section 79 of, and paragraph 3 to Schedule 6 to, the Town and Country Planning Act 1990. This was because the appeal concerns a proposal for development of major importance having more than local significance and because it is for significant development within the Green Belt.

Inspector's recommendation and summary of the decision

4. The Inspector recommended that the appeal be dismissed and planning permission refused.

5. For the reasons given below, the Secretary of State agrees with the Inspector's conclusions and agrees with her recommendation. He has decided to dismiss the appeal and refuse planning permission. A copy of the Inspector's report (IR) is enclosed. All references to paragraph numbers, unless otherwise stated, are to that report.

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Procedural Matters

6. In reaching this position, the Secretary of State has taken into account the Environmental Statement (ES) which was submitted under the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 and the environmental information submitted before the inquiry opened. Overall, the Secretary of State is satisfied that the ES complies with the above Regulations and that sufficient information has been provided for him to assess the environmental impact of the proposal.

7. The Secretary of State has noted the content of your letter and enclosures of 27 January 2016 about the Department for Transport's planning decision of 12 January 2016 relating to the Strategic Rail Freight Interchange (SRFI) known as the East Midlands Gateway. However, the Secretary of State does not consider that the information provided raises any matters that would require him to refer back to the parties for further representations prior to reaching his decision on this appeal, and he is satisfied that no interests have thereby been prejudiced.

Policy and statutory considerations

8. In reaching his decision, the Secretary of State has had regard to section 38(6) of the Planning and Compulsory Purchase Act 2004 which requires that proposals be determined in accordance with the development plan unless material considerations indicate otherwise.

9. In this case, the relevant parts of the development plan comprises the Slough Core Strategy 2006-2026 (CS), adopted December 2008, the Slough Site Allocations Development Plan Document (SSA), adopted November 2010 and the saved policies of the Local Plan for Slough (LPfS) adopted March 2004. The Secretary of State considers that the development plan policies most relevant to this case are those referred to by the Inspector at IR5.2 - 5.12. He is satisfied that these policies are generally consistent with the Framework.

10. Other material considerations which the Secretary of State has taken into account include: the Framework; the Guidance; the Community Infrastructure Levy (CIL) Regulations; and The London Plan 2011 (consolidated with alterations since 2011), adopted in March 2015, including Policies 6.14 and 6.15.

11. The Secretary of State has also taken account of the Department for Transport's Strategic Rail Freight Interchange Policy Guidance and its Logistics Growth Review Document (both published in November 2011); the joint Written Ministerial Statement on Strategic Rail Freight Interchanges issued by the Secretary of State for Transport and the Secretary of State for Communities and Local Government on 29 November 2011; and the National Policy Statement for National Networks (published in January 2015).

Main issues

12. The Secretary of State agrees with the Inspector that the main issues in this case are those set out by the Inspector at IR12.2 and whether the proposal complies with the development plan and with national policy.

Green Belt

13. The Secretary of State agrees with the Inspector's comments at IR12.8, and like the Inspector, concludes that the appeal proposal would be inappropriate development in the Green Belt and that it is harmful as such. As the proposal amounts to inappropriate

development he considers that, in the absence of very special circumstances, it would conflict with national policies and with the CS. Like the Inspector, the Secretary of State considers that the NPS does not change the policy test for SRFI applications in the Green Belt or the substantial weight to be attached to the harm to the Green Belt (IR12.8). For the reasons given by the Inspector at IR12.9 – 12.11, the Secretary of State agrees with the Inspector's conclusion (IR12.12) that the proposed development would result in a severe loss of openness.

14. The Secretary of State agrees with the Inspector that the introduction of major development on the site, even if enclosed within well-defined boundaries, would not assist in checking sprawl and hence would conflict with a purpose of the Green Belt (IR12.13). For the reasons given by the Inspector at IR12.14, the Secretary of State agrees that the proposal would not be compatible with the purpose of preventing neighbouring towns merging into one another. The Secretary of State accepts the Inspector's conclusion that the proposed development would encroach into the countryside. He agrees too that this conflict is not overcome by the proposed creation of new habitats and other aspects of mitigation in existing countryside areas (12.15). The Secretary of State agrees with the Inspector's overall conclusion that these conflicts should be afforded substantial weight (IR12.18). The Inspector acknowledges that the proposed SRFI development's location in the Green Belt may well be an optimum solution in relation to existing patterns of distribution activity, but like the Inspector, the Secretary of State concludes that this does not reduce the actual harm that would occur (IR12.19).

Strategic Gap

15. For the reasons given by the Inspector at IR12.20 – 12.27, the Secretary of State agrees with her conclusion that the development would be a dominant group of large scale buildings and infrastructure that would generate a large volume of traffic and activity. The Secretary of State concurs with the Inspector's view that even with a high quality landscape scheme, its presence would cause irreparable harm to the Strategic Gap. He agrees too that the scheme conflicts with Policy CG9 of the LPfS which states that development which threatens the role of open land within the strategic Green Belt gap should not be permitted (IR12.28).

Colne Valley Park

16. The Secretary of State has carefully considered the Inspector's reasoning at IR 12.29 – 12.37. Like the Inspector, the Secretary of State agrees that the Landscape and Green Infrastructure Strategy (LGIS) would be likely to deliver a high quality landscape scheme and improvements to the public rights of way network. Physical movement through the Park in this area probably would be improved and proposals comply with Policy T7 of the LPfS. Taking a wider perspective, he agrees that the objectives for the Park would be supported by a proportionate financial contribution towards the improvement of access by pedestrians, cyclists and equestrians, habitat enhancement and other initiatives. Furthermore, habitat improvement, creation and management would conserve the nature conservation resources of the Park in compliance with criterion (d) of Policy CG1.

17. On the negative side there would be localised harm to the landscape and amenity of Colne Valley Park, principally through the adverse change in the character and use of the site. The loss of the intangible countryside feel and associated amenity could not be adequately replaced. The development would detract from users' enjoyment of the rights

of way (LPfS Policy CG2) and there is uncertainty over delivery and timescale of potential off-site enhancements. Overall the scheme would not be consistent with the purpose of the Colne Valley Park. As a result of the harm to the scenic and amenity value the proposal is not supported by Policy CG1 of the LPfS. This conclusion adds moderate weight against the proposal.

Landscape character and visual effect

18. For the reasons given by the Inspector at IR12.41 – 12.47, the Secretary of State accepts the Inspector's conclusion that although the SRFI would be a large scale commercial operation, in the broad landscape context, the impact would be negligible. However, at local level the harm would be more significant and he agrees that overall, the harm to landscape character has a small amount of weight. The Secretary of State accepts the Inspector's conclusion that the effects on visual amenity would be most acutely experienced by those living in the area as they travel to and from home or when viewing the landscape in leisure time. The Secretary of State gives the visual harm modest weight. He agrees with the Inspector that there is a degree of conflict with Core Policy 9 (IR12.48).

Highways and Traffic

19. The Secretary of State has carefully considered the Inspector's analysis of highways and traffic issues and for the reasons given at IR12.49 – 12.56, he agrees with the Inspector that improvements can be undertaken within the transport network that would effectively limit the significant impacts of the development. He agrees too that safe and suitable access to the site is able to be achieved for all people. The necessary transportation infrastructure would be delivered, as required by Core Policy 9 (IR12.57).

Air quality

20. For the reasons given by the inspector at IR 12.58 – 12.63, the Secretary of State accepts his conclusion that the proposed development with appropriate mitigation would comply with Core Policy 8. He agrees too that the slight adverse effect on air quality has limited weight (IR12.64).

Biodiversity

21. The Secretary of State has carefully considered the Inspector's reasoning at IR 12.65 – 12.75 and accepts his conclusion that the proposal offers opportunities to conserve and enhance biodiversity, primarily through the LGIS. With reference to the principles in paragraph 118 of the Framework and the LGIS as a whole, the Secretary of State agrees that the effect on biodiversity is acceptable on the basis that the proposed mitigation is secured (IR12. 76).

Flood risk and water resources

22. The Secretary of State accepts the Inspector's conclusion at IR12.82 that the Flood Risk Assessment demonstrates that the development, incorporating the proposed mitigation measures, would not increase flood risk.

Local communities and cumulative impact

23. The Secretary of State notes that the cumulative impact of the proposed development with other schemes in the area was assessed using the best available information for the purposes of the 2015 ES Addendum. In addition, the potential highways impact of the proposed relocation of the Heathrow Express Depot to Langley was considered. The Appellant and SBC agree that WRATH and the relocation of the Depot to Langley are unlikely to have a significant effect during construction and operation (IR12.84). However the Inspector notes that there is a degree of uncertainty, and a safeguard has been introduced into the section 106 agreement. There is an acknowledgment that base traffic flows on the A4 at Brands Hill may increase over and above the predicted growth due to the implementation of other schemes. If junctions are shown to be operating at or over capacity through additional traffic surveys and modelling work, provision is made for mitigation measures to be included in the CEMP. The Secretary of State agrees that this planning obligation is a necessary and reasonable response (IR 12.85).

Other considerations

Need

24. The Secretary of State has carefully considered the Inspector's reasoning about need at IR12.88 - 12.103 and accepts the Inspector's conclusion that the current policy need for a regional network has not been overcome by the SRFI at Radlett and SIFE is able to be regarded as a complementary facility as part of a wider network (IR12.104).

25. With regard to the Inspector's analysis of other developments and sites at IR 12.105 – 12.106, the Secretary of State agrees that the NPS makes clear that perpetuating the status quo, which means relying on existing operational rail freight interchanges, is not a viable option.

26. The Secretary of State agrees with the Inspector that there is a reasonable probability that Radlett will be operational in 2018 and there is the prospect of Howbury Park being progressed to implementation. In addition, rail connected warehousing is under development in Barking. On the downside, the geographical spread is uneven. There is a noticeable gap in provision on the west side of London, with Radlett being complementary to rather than an alternative to SIFE. SIFE would contribute to the development of a network of SRFI in London and the South East and a wider national network in accordance with the policy objective of the NPS (IR12.107).

Transport links and location requirements

27. The Secretary of State has considered carefully the Inspector's analysis at IR 12.108 – 12.136 and agrees with his conclusion that SIFE would have the transport links and location attributes to fulfil the NPS requirements to a very good standard.

Transfer from road to rail

28. The Secretary of State notes that Slough Borough Council, as well as others including Colnbrook with Poyle Parish Council and RPRA, are concerned that the warehousing units provided as part of the development would be occupied by companies primarily interested in road to road transport of goods. He has carefully considered the Inspector's analysis of this matter at IR 12.138 – 12.147. For the reasons given by the

Inspector, the Secretary of State agrees that the risk of not attaining a high level of rail use would be low (IR 12.148).

Carbon emissions

29. For the reasons given by the Inspector at R 12.149 – 12.150, the Secretary of State agrees that the reduction in carbon emissions as a result of SIFE facilitating the movement of freight by rail is a positive factor and affords it moderate weight.

Economy and jobs

30. The Secretary of State agrees with the Inspector that the beneficial economic aspects of the development would be felt in the area both during construction and operation (IR12.151) and would thereby promote national policy objectives to secure economic growth (IR12.152). He gives this matter moderate weight.

Alternative sites

31. For the reasons given by the Inspector at IR 12.153 – 12.156, the Secretary of State agrees that there is no identified alternative site to SIFE, in the sense of being capable of fulfilling the same purpose, serving the same markets and being geographically comparable in order to achieve the desired spread of SRFIs round Greater London. Like the Inspector (IR12.156) the Secretary of State gives this matter considerable weight in favour of the proposal.

Use of Green Belt land and LGIS

32. The Secretary of State notes that the NPS, whilst acknowledging promoters may find the only viable sites are on Green Belt land, draws attention to the special protection given to Green Belt land. Like the Inspector, he attaches no weight to 'the development being essential on Green Belt land' (IR 12.157) being a matter that he has considered in relation to need and alternative sites in the above paragraphs numbered 24-26 and 31.

33. Turning to the LGIS which aims to mitigate harm caused by the development to landscape character, amenity, public rights of way, biodiversity and to ensure a high standard of design as required by national and development plan policy, the Secretary of State accepts the Inspector's view that as a consequence of these aims, no positive weight is warranted (IR 12.158).

Other matters

34. For the reasons given by the Inspector at IR12.159 – 12.160, the Secretary of State agrees that given the current position and uncertainty over whether or not a new north runway at Heathrow will be progressed, no weight should be given to this matter in the Green Belt balancing exercise (IR12.161).

35. The Secretary of State agrees with the Inspector (IR 12.162) that there may be a problem with site assembly, but the ability to deliver SIFE is a neutral matter that counts neither for nor against the development.

Planning conditions

36. The Secretary of State has given consideration to the Inspector's analysis at IR (IR12.163 – 12.178), the recommended conditions set out at appendix 1 of the Inspector's Report and the reasons for them, and to national policy in paragraph 206 of

the Framework and the relevant Guidance. He is satisfied that the conditions recommended by the Inspector comply with the policy test set out at paragraph 206 of the Framework. However, he does not consider that the imposition of these conditions would overcome his reasons for dismissing this appeal.

Planning obligations

37. Having had regard to the inspector's analysis at IR12.179 – 12.186, paragraphs 203 – 205 of the Framework, the Guidance and the Community Infrastructure Levy Regulations 2010, as amended, the Secretary of State agrees with the Inspector's conclusion for the reasons given at IR12.180 that all the planning obligations are necessary to make the development acceptable in planning terms, directly related to the development and fairly and reasonably related in scale and kind to the development. The obligations comply with the statutory tests in Regulation 122 and with the policy tests in paragraph 204 of the Framework. However, the Secretary of State does not consider that the obligations overcome his reasons for deciding that the appeal should be dismissed.

Planning balance and overall conclusion

38. The Secretary of State has given very careful consideration to the Inspector's concluding remarks at IR12.187 – 12.206.

39. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that proposals be determined in accordance with the development plan unless material considerations indicate otherwise. For the reasons set out in this letter, the Secretary of State concludes that the proposal is inappropriate development and by definition harmful to the Green Belt. He found that the development is contrary to Core Policy 1 of the CS and national policy in the Framework. The Secretary of State finds that the totality of the harm to the Green Belt has very substantial weight. In addition, he finds that the damage to the Strategic Gap would be irreparable, which adds significant weight against the proposal. In addition he has found that there is localised harm to Colne Valley Park to which he adds moderate weight against the proposal. He gives limited weight to the slight adverse impact on air quality, and a small degree of weight to the harmful social effect and erosion of quality of life of local communities. He affords, subject to conditions, no weight to potential harms to biodiversity, water quality or through flood risk. The Secretary of State has then gone on to consider whether there are any material considerations justifying determining the case other than in accordance with the development plan.

40. The Secretary of State accepts that the most important benefit of the proposal is the potential contribution to building up a network of SRFIs in the London and South East region, reducing the unmet need and delivering national policy objectives. In addition, there is the prospect of SIFE being complementary to Radlett and other smaller SRFI developments and improving the geographical spread of these facilities round Greater London. In this context, the Secretary of State accepts that the contribution it would make to meeting unmet need is considerable.

41. He accepts too that SIFE would comply with the transport and location requirements for SRFIs to an overall very good standard. He acknowledges that sites suitable for SRFIs are scarce and the difficulty in finding sites in the London and South East region. On account of this factor, and the standard of compliance achieved, he affords meeting the site selection criteria significant weight. No less harmful alternative site has been

identified in the West London market area, a factor which he affords considerable weight. Attracting less but nevertheless moderate weight are the economic benefits, the reduction in carbon emissions and improvements.

42. In common with the Inspector in her conclusion, the Secretary of State has been persuaded by the irreparable harm that would be caused to this very sensitive part of the Green Belt in the Colnbrook area, leading to the high level of weight he attaches to this consideration. Overall, the Secretary of State concludes that the benefits of the scheme do not clearly overcome the harm. Consequently very special circumstances do not exist to justify the development. Furthermore, he finds that planning conditions would not be able to overcome the fundamental harms caused to the Green Belt, Strategic Gap and Colne Valley Park and the open environment enjoyed by the local community. In addition, he has concluded that the proposal does not have the support of the NPS because very special circumstances have not been demonstrated.

Formal Decision

43. Accordingly, for the reasons given above, the Secretary of State agrees with the Inspector's recommendation. He hereby dismisses your client's appeal and refuses to grant outline planning permission for the construction of a rail/road freight interchange comprising an intermodal terminal and Class B8 distribution units on land north of A4 (Colnbrook Bypass), Colnbrook, Slough in accordance with application Ref P/14961/000 dated 27 September 2010.

Right to challenge the decision

44. A separate note is attached setting out the circumstances in which the validity of the Secretary of State's decision may be challenged. This must be done by making an application to the High Court within six weeks from the day after the date of this letter for leave to bring a statutory review under section 288 of the Town and Country Planning Act 1990.

45. A copy of this letter has been sent to St Albans City and District Council. A letter of notification has also been sent to all other parties who asked to be informed of the decision.

Phil Barber

Phil Barber
Authorised by the Secretary of State to sign in that behalf

Appendix 4 – Key Relevant Inspectors Reports and Decision Letters extracts

e. Slade Green SRFI Decision 2019

Ministry of Housing, Communities & Local Government

Our ref: APP/D5120/W/17/3184205 &
APP/T2215/W/17/3184206.
Your ref: NLP-DMS.FID299507

Sarah Fabes
Lichfields,
14 Regent's Wharf,
All Saints Street,
London, N1 9RL

7th May 2019

Dear Madam

TOWN AND COUNTRY PLANNING ACT 1990 – SECTION 78
APPEALS MADE BY ROXHILL DEVELOPMENTS LIMITED
LAND ADJACENT TO THE SOUTHEASTERN TRAIN DEPOT, MOAT LANE, SLADE GREEN, ERITH
APPLICATION REF: 15/02673/OUTEA and DA/15/01743/OUT

1. I am directed by the Secretary of State to say that consideration has been given to the report of Mr I Jenkins BSc CEng MICE MCIWEM who held a public local inquiry between 19 June and 27 September 2018 into your client's appeals against the decisions of London Borough of Bexley, as directed by the Mayor of London, and Dartford Borough Council to refuse your client's application for planning permission for a cross-boundary outline application for the demolition of existing buildings and redevelopment to provide a strategic rail freight interchange comprising a rail freight intermodal facility, warehousing, new access arrangements from Moat Lane, associated HGV, car, cycle parking, landscaping, drainage, and associated works (within London Borough of Bexley). Creation of a new access road from the existing A206/A2026 roundabout, incorporating a bridge over the River Cray, landscaping and associated works (within Dartford Borough Council) in accordance with application ref: 15/02673/OUTEA and DA/15/01743/OUT dated 20 November 2015.

2. On 7 November 2017 these appeals were recovered for the Secretary of State's determination, in pursuance of section 79 of, and paragraph 3 of Schedule 6 to, the Town and Country Planning Act 1990.

Inspector's recommendation and summary of the decision

3. The Inspector recommended that the appeals be dismissed, and planning permission be refused.

4. For the reasons given below, the Secretary of State agrees with the Inspector's conclusions, and agrees with his recommendation. He has decided to dismiss the appeals and refuse planning permission. A copy of the Inspector's report (IR) is

enclosed. All references to paragraph numbers, unless otherwise stated, are to that report.

Environmental Statement

5. In reaching this position, the Secretary of State has taken into account the Environmental Statement which was submitted under the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 and the supplementary environmental information submitted before the inquiry opened. Having taken account of the Inspector's comments at IR1.2.2, the Secretary of State is satisfied that the Environmental Statement and other additional information provided complies with the above Regulations and that sufficient information has been provided for him to assess the environmental impact of the proposal.

Policy and statutory considerations

6. In reaching his decision, the Secretary of State has had regard to section 38(6) of the Planning and Compulsory Purchase Act 2004 which requires that proposals be determined in accordance with the development plan unless material considerations indicate otherwise.

7. In this case the development plan consists of the adopted development plans for the area which comprises The London Plan, March 2016; the Bexley Core Strategy Development Plan Document, February 2012; and, saved policies of the Bexley Unitary Development Plan, 2004 for LBB. The Dartford Core Strategy, September 2011; and, the Dartford Development Policies Plan (DDPP), July 2017 for Dartford Borough Council. Other plans that affect the site are The Mayor's Transport Strategy 2018 and The Kent County Council Local Transport Plan 4: Delivering Growth without Gridlock 2016-2031. The Secretary of State considers that the development plan policies of most relevance to this case are those set out at IR6.1.3 to 6.2.9. Other local planning guidance considered include the Mayor's Transport Strategy, 2018 and the Kent County Council Local Transport Plan 4: Delivering Growth without Gridlock 2016-2031 as set out at IR 6.5

8. Other material considerations which the Secretary of State has taken into account include the National Policy Statement for National Networks and the National Planning Policy Framework ('the Framework') and associated planning guidance ('the Guidance'). The revised National Planning Policy Framework was published on 24 July 2018 and further revised in February 2019. Unless otherwise specified, any references to the Framework in this letter are to the revised Framework.

Emerging plan

9. The emerging plan comprises the London Plan – The Spatial Development Strategy for Greater London outlined in the Inspectors Report at IR6.4. The Secretary of State considers that the emerging policies of most relevance to this case include LPe Policy G2, T7, and SD1.

10. Paragraph 48 of the Framework states that decision makers may give weight to relevant policies in emerging plans according to: (1) the stage of preparation of the emerging plan; (2) the extent to which there are unresolved objections to relevant policies in the emerging plan; and (3) the degree of consistency of relevant policies to the policies in

the Framework. While Examination in Public hearings have taken place since the inquiry closed, due to the early stage of the emerging plan only limited weight is attributed to the policies as outlined in the Inspectors Report at IR6.4.4.

Main issues

Location of site and Green Belt

11. The Secretary of State agrees with the Inspector for the reasons given in IR15.2.3 to 15.2.5 that the appeals proposal would cause substantial harm to the Green Belt (IR 15.2.6). He therefore considers that this carries substantial weight against the scheme. In accordance with paragraph 143 of the Framework, inappropriate development should not be approved except in very special circumstances.

Character and Appearance

12. For the reasons given at IR 15.3.1 to 15.3.6 the Secretary of State agrees with the Inspector that both the landscape impact and the visual impact of the appeals scheme would be substantial and adverse. Overall, he considers that it would cause significant harm to the character and appearance of the local area and he therefore attributes significant weight to this harm.

Rail issues

13. The Secretary of State acknowledges that given the locational need for effective connections for both rail and road, the number of locations suitable for Strategic Rail Freight Interchanges will be limited. He agrees with the Inspector at IR 15.4.3 that for the proposed rail link to be considered 'adequate', it would be necessary for it to be capable of accommodating 4 trains/day as a minimum. For the reasons given in IR 15.4.6 to 15.4.20, he agrees with the Inspector (15.4.20) that the likelihood of passenger service numbers having to be reduced in order to accommodate the appeals site freight traffic appears significant. The Secretary of State agrees with the Inspector's conclusion that there is significant uncertainty (15.4.21) as to whether the timetable could be flexed/amended to accommodate four trains per day to/from the appeals site either now or in the future. He agrees with the Inspector that overall this would conflict with the aims of a number of development plan policies that seek to minimize any adverse impact on the wider transport network and safeguard or improve public transport services, and that this should carry significant weight.

Highways Issues

14. For the reasons given in IR15.5.4 to 15.5.28, the Secretary of State agrees with the Inspectors findings (IR15.5.29) that, by 2031, the residual cumulative impact of the development during 'normal' (non-incident) highway conditions on the local highway network would be likely to be severe. He further agrees with the Inspector for the reasons given at IR 15.5.30 to 15.5.36 that, during incidents, the proposal would be likely to have a material, albeit limited, adverse impact, adding to severe conditions. He also agrees with the Inspector for the reasons given at IR 15.5.38 to 15.5.42 that the proposed mitigation measures do not alter this finding. The Secretary of State considers that the proposal would cause considerable harm to the convenience of highway users in Dartford. He notes that the proposal would be in conflict with the DDPP. The Secretary of State attributes significant weight to this matter.

Amenity and living conditions

15. For the reasons given in IR15.6.2 to 15.6.7, the Secretary of State agrees with the Inspector (IR15.6.8) that on balance, the appeals proposal would be unlikely to have an unacceptable material impact on living conditions in the local area, with particular reference to air quality. For the reasons given in IR15.6.9 to 15.6.11, the Secretary of State also agrees with the Inspector (IR15.6.12) that subject to mitigation secured the proposal is unlikely to cause noise and vibration that would have an unacceptable impact on living conditions. The Secretary of State therefore considers that these matters do not weigh against the scheme.

Other matters

16. For the reasons given at IR15.7.1 The Secretary of State agrees with the Inspector that the effect on Howbury Moat and a Grade II listed tithe barn would be negligible, and that their significance would not be materially harmed by the scheme, therefore the Secretary of State considers that there are no policy conflicts in this respect, or in respect of Howbury Grange. He further agrees with the Inspector for the reasons given in IR15.7.2 to 15.7.5 that there are no unacceptable impacts of the scheme in terms of the effect on living conditions of neighbouring residents, navigation and facilities along the River Cray, and flood risk.

Need for SRFIs in London and the South East

17. The Secretary of State agrees with Inspector that there is an identified need for a Strategic Rail Freight Interchange to serve London and the South East (IR15.8.7). However, given the uncertain findings in relation to both road and rail connectivity at IR15.8.10 to 15.8.15, he agrees with the Inspector's conclusion that the appeals scheme would not be well qualified to meet the identified need (IR15.8.16 and IR15.8.17).

Availability of alternative sites

18. The Secretary of State agrees with the Inspector that in the 2007 decision it was identified that there was no alternative development site, a finding which attracted considerable weight in favour of that scheme (IR4.2). However, since 2007 the London Gateway, a brownfield site not located in the Green Belt, has been developed. For the reasons given in IR15.8.18 to 15.8.24, the Secretary of State agrees with the Inspector's conclusions that the London Gateway site has the potential to provide an alternative development option for the provision of a SRFI to serve the same part of London and the South East as the appeals proposal (IR15.8.26).

Economic and Social impacts

19. The Secretary of State notes that the largest part of the appeal site lies within the Bexley Riverside Opportunity Area, and that the establishment of a SRFI at the appeals site would be consistent with that particular strategic policy direction. He agrees with the Inspector that it could provide significant benefits to the local economy creating a large amount of new employment (IR15.8.28). However, the Secretary of State notes that the Inspector found that the proposal would also be likely to have a material adverse effect on traffic congestion in the area which may have adverse impacts on the local economy (IR15.8.29). The Secretary of State also agrees with the Inspector that, given that broadly similar benefits could be obtained from the alternative, non-Green Belt site

(IR15.8.31), overall limited weight could be given to the socio-economic benefits of the scheme.

Effect on biodiversity

20. The Secretary of State notes that there are no statutory designated sites of nature conservation interest within or adjacent to the appeals site. Furthermore, he notes that the habitats that would be lost to development are of little ecological value, comprising improved and semi-improved grassland, and that an aim of the proposed landscaping along the eastern side of the site would be to enhance its ecology value, likely resulting in a net biodiversity gain overall (IR15.8.46). The Secretary of State agrees with the Inspector and attributes moderate weight to this gain.

Planning conditions

21. The Secretary of State has given consideration to the Inspector's analysis at IR15.8.47 to 15.8.62, the recommended conditions set out at the end of the IR and the reasons for them, and to national policy in paragraph 55 of the Framework and the relevant Guidance. He is satisfied that the conditions recommended by the Inspector comply with the policy test set out at paragraph 55 of the Framework. However, he does not consider that the imposition of these conditions would overcome his reasons for dismissing this appeal and refusing planning permission.

Planning obligations

22. Having had regard to the Inspector's analysis at IR 15.8.63 to 15.8.66, the planning obligation dated September 2018, paragraph 56 of the Framework, the Guidance and the Community Infrastructure Levy Regulations 2010, as amended, the Secretary of State agrees with the Inspector's conclusion for the reasons given in IR18.8.65 that the obligation complies with Regulation 122 and 123 of the CIL Regulations and the tests at paragraph 56 of the Framework. However, the Secretary of State does not consider that the obligation overcomes his reasons for dismissing this appeal and refusing planning permission.

23. The Secretary of State has considered whether it is necessary for him to refer back to parties in respect of regulation 123 prior to determining this appeal. However, the Secretary of State does not consider that the planning obligation overcomes his reasons for deciding that the appeal should be dismissed, as set out in this decision letter. Accordingly, he does not consider it necessary for him to do so.

Planning balance and overall conclusion

24. For the reasons given above, the Secretary of State considers that the appeal scheme is not in accordance with LP Policy 7.16, BCS Policies CS01 and CS17 as well as DCS Policies CS 1, CS 13 and DDPP Policy DP22 and LPe Policy G2 of the development plan and is not in accordance with the development plans overall. He has gone on to consider whether there are material considerations which indicate that the proposal should be determined other than in accordance with the development plan.

25. In this case the Secretary of State considers that the harm to the Green Belt from inappropriate development carries substantial weight against the scheme and the effect on the character and appearance of the local area carries significant weight along with

the adequacy of the proposed rail link and the effect on existing/future passenger rail services. Significant weight is also given to the effect on the convenience of highway users.

26. The Secretary of State considers that the provision of social economic benefits of the scheme has overall limited weight and the resulting net biodiversity gain has moderate weight.

27. The Secretary of State considers that the benefits of the scheme do not outweigh the harm to the Green Belt by reason of inappropriateness and any other harm, and so very special circumstances do not exist. He considers that the adverse impacts of the proposal significantly and demonstrably outweigh the benefits. Overall, he considers that there are no material considerations which indicate that the proposal should be determined other than in accordance with the development plan.

28. The Secretary of State therefore concludes that the appeal is dismissed, and planning permission is refused.

Formal decision

29. Accordingly, for the reasons given above, the Secretary of State agrees with the Inspector's recommendation. He hereby dismisses your client's appeals and refuses planning permission for a cross-boundary outline application for the demolition of existing buildings and redevelopment to provide a strategic rail freight interchange comprising a rail freight intermodal facility, warehousing, new access arrangements from Moat Lane, associated HGV, car, cycle parking, landscaping, drainage, and associated works (within London Borough of Bexley), and for the creation of a new access road from the existing A206/A2026 roundabout, incorporating a bridge over the River Cray, landscaping and associated works (within Dartford Borough Council)

Right to challenge the decision

30. A separate note is attached setting out the circumstances in which the validity of the Secretary of State's decision may be challenged. This must be done by making an application to the High Court within 6 weeks from the day after the date of this letter for leave to bring a statutory review under section 288 of the Town and Country Planning Act 1990.

31. A copy of this letter has been sent to London Borough of Bexley, Dartford Borough Council and the Mayor of London, and notification has been sent to others who asked to be informed of the decision.

Yours faithfully

Andrew Lynch

Andrew Lynch
Authorised by the Secretary of State to sign in that behalf

Appendix 5 – Case Law

a. R (Evans) v AG

*1787 Regina (Evans) v Attorney General (Campaign for Freedom of Information intervening)

Court
Supreme Court

Judgment Date
26 March 2015

Report Citation
[2015] UKSC 21
[2015] A.C. 1787

Supreme Court

Lord Neuberger of Abbotsbury PSC , Baroness Hale of Richmond DPSC , Lord Mance , Lord Kerr of Tonaghmore , Lord Wilson , Lord Reed , Lord Hughes JJSC

2014 Nov 24, 25; 2015 March 26

Freedom of information—Exempt information—Accountable person's certificate—Upper Tribunal ordering partial disclosure of correspondence between Prince of Wales and government departments—Attorney General issuing certificate effectively overriding requirement for disclosure—Whether "reasonable grounds" justifying issue of certificate—Whether certification concerning environmental information compatible with European Union law and treaty obligations on access to environmental information— Freedom of Information Act 2000 (c 36), s 53(2) — Environmental Information Regulations 2004 (SI 2004/3391), reg 18 — Parliament and Council Directive 2003/4/EC, art 6 — Charter of Fundamental Rights of the European Union, art 47 — Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998), art 9

Various government departments, and on appeal the Information Commissioner, refused the claimant journalist's request for disclosure of communications passing between the Prince of Wales and the departments. The Upper Tribunal allowed the claimant's appeal in relation to certain correspondence, which included some environmental information. The departments did not seek permission to appeal against that decision. Thereafter the Attorney General, as the appropriate accountable person, issued a certificate under section 53(2) of the Freedom of Information Act 2000 [1] that he had on reasonable grounds formed the opinion that there had been no failure to comply with the relevant provisions of the 2000 Act or of the Environmental Information Regulations 2004 [2] , thereby effectively overriding the decision of the Upper Tribunal. The claimant sought judicial review of the decision to issue a certificate claiming that the exercise of the power was not justified and was, accordingly, unlawful. The further issue arose at the hearing whether section 53 of the 2000 Act, as purportedly applied to environmental information requests by regulation 18 of the 2004 Regulations, was incompatible with European Union law on access to environmental information, in particular, article 6 of Parliament and Council Directive 2003/4/EC [3] , article 9 of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998) and article 47 of the Charter of Fundamental Rights of the European Union . The Divisional Court of the Queen's Bench Division dismissed the claim, holding that (i) although reasonable grounds had to exist before the power was exercised section 53 enabled the accountable person to prefer his own view to that of a tribunal without having to demonstrate that the latter's conclusion had been irrational, and the Attorney General had made a proper and rational *1788

evaluative judgment on the weight to be accorded to various competing public interest factors which had been reasonable; and (ii) the exercise of the section 53(2) power over environmental information was not incompatible with the requirement of access to a court of law or other independent body established by law in article 6 of the Directive and article 9 of the Aarhus Convention , the manner of any review by a court was a matter for domestic law, and the judicial review procedure was sufficiently flexible to permit close scrutiny of the reasonableness and appropriateness of the issue of the certificate. The Court of Appeal allowed the claimant's appeal and set aside the Attorney General's certificate.

On the Attorney General's appeal—

Held , (1), dismissing the appeal (Lord Wilson and Lord Hughes JJSC dissenting), that the Attorney General had not been entitled to issue a certificate under section 53 of the Freedom of Information Act 2000 in the way he had done; and that, accordingly, the certificate was invalid and unlawful (post, paras 86, 114, 145, 150, 151).

Dicta of Simon Brown LJ in R v Warwickshire County Council, Ex p Powergen plc (1997) 96 LGR 617 , 626, CA and of Sir John Chadwick in *R (Bradley) v Secretary of State for Work and Pensions (Attorney General intervening) [2009] QB 114* , para 91, CA considered.

(2) Lord Wilson JSC dissenting, that since Parliament and Council Directive 2003/4/EC (as given effect in domestic law by the Environmental Information Regulations 2004) by article 6(2)(3) required an applicant whose request for disclosure of environmental information had been refused by the public authority holding it to have access to a review before a court or other independent and impartial body established by law, the decisions of which would become final and binding on the authority concerned, it would be impermissible for the executive to have a further opportunity to prevent disclosure by way of a right, under regulation 18(6) of the 2004 Regulations read with section 53 of the 2000 Act, to override a judicial decision provided for in article 6(2) ; and that, accordingly, regulation 18(6) was incompatible with article 6 of the Directive and the certificate would therefore be ineffective in respect of the environmental information in any event (post, paras 100–105, 111, 113, 147–149, 150, 153, 167).

Per Baroness Hale of Richmond DPSC, Lord Mance, Lord Wilson and Lord Hughes JJSC. Section 53 can and should be read as having an effect wide enough that the Attorney General can, under the express language of section 53(2) , assert that he has reasonable grounds for considering that disclosure is not due under the 2000 Act. Disagreement as to the weight to be attached to competing public interests found by the tribunal is a matter contemplated by the statute and which a certificate could properly address by properly explained and solid reasons (post, paras 124, 129, 130, 142, 145, 153, 155, 171, 172, 174–179).

Per Lord Neuberger of Abbotsbury PSC, Lord Kerr of Tonaghmore and Lord Reed JSC. It is a basic principle that a decision of a court is binding as between the parties and cannot be ignored or set aside by anyone, including the executive. It is also fundamental to the rule of law that decisions of the executive are reviewable by the court at the suit of an interested party. If section 53 were to entitle a member of the executive to overrule a decision of the judiciary simply because, on consideration of the same facts and arguments, he does not like it, that meaning would have to be crystal clear from the wording of the Act. Section 53 falls short of being crystal clear. The section can fairly be given a narrow range of potential application, such as where there is a material change of circumstances since the judicial decision. On the language of section 53 the words "reasonable grounds" are dependent on their context. Given the detailed investigative processes by which a judicial decision is reached, the accountable person's grounds are not "reasonable" if they simply involve disagreeing with the conclusions of a court or judicial tribunal on the same material as was before it (post, paras 52, 58–59, 86, 88, 89, 90, 91, 115).

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Per Baroness Hale of Richmond DPSC and Lord Mance JSC. "Reasonable grounds" in section 53(2) imposes a higher hurdle than mere rationality. Disagreement with findings of fact or rulings of law in a fully reasoned decision will require the clearest possible justification. The Attorney General's certificate does not engage with or give any real answer to the closely reasoned decision of the Upper Tribunal but proceeds on the basis of findings which differ radically from those made by the tribunal without any adequate explanation, and thus does not satisfy the test for its issue because the disagreement with the tribunal's detailed findings and conclusions reflected in the certificate has not been justified on reasonable grounds (post, paras 129, 130, 142, 145).

Decision of the Court of Appeal [2014] EWCA Civ 254; [2014] QB 855; [2014] 2 WLR 1334; [2014] 3 All ER 682 affirmed.

The following cases are referred to in the judgments:

AXA General Insurance Ltd v HM Advocate [2011] UKSC 46; [2012] 1 AC 868; [2011] 3 WLR 871 , SC(Sc)
Al Rawi v Security Service (JUSTICE intervening) [2011] UKSC 34; [2012] 1 AC 531; [2011] 3 WLR 388; [2012] 1 All ER 1 , SC(E)
Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147; [1969] 2 WLR 163; [1969] 1 All ER 208 , HL(E)
Associated Provincial Pictures Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680 , CA
Department for the Environment, Food and Rural Affairs v Information Comr [2011] EWCA Civ 1606; [2012] PTSR 1299 , CA
Impact v Minister for Agriculture and Food (Case C-268/06) EU:C:2008:223; [2009] All ER (EC) 306; [2008] ECR I-2483 , ECJ
M v Home Office [1994] 1 AC 377; [1993] 3 WLR 433; [1993] 3 All ER 537 , HL(E)
Prohibitions del Roy (1607) 12 Co Rep 64
R v Cheltenham Comrs (1841) 1 QB 467
R v Secretary of State for the Home Department, Ex p Danaei [1998] INLR 124 , CA
R v Secretary of State for the Home Department, Ex p Pierson [1998] AC 539; [1997] 3 WLR 492; [1997] 3 All ER 577 , HL(E)
R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115; [1999] 3 WLR 328; [1999] 3 All ER 400 , HL(E)
R v Warwickshire County Council, Ex p Powergen plc (1997) 96 LGR 617 , CA
R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23; [2003] 2 AC 295; [2001] 2 WLR 1389; [2001] 2 All ER 929 , HL(E)
R (Bradley) v Secretary of State for Work and Pensions (Attorney General intervening) [2008] EWCA Civ 36; [2009] QB 114; [2008] 3 WLR 1059; [2008] 3 All ER 1116 , CA
R (Jackson) v Attorney General [2005] UKHL 56; [2006] 1 AC 262; [2005] 3 WLR 733; [2005] 4 All ER 1253 , HL(E)
Racal Communications Ltd, In re [1981] AC 374; [1980] 3 WLR 181; [1980] 2 All ER 634 , HL(E)
T-Mobile (UK) Ltd v Office of Communications [2008] EWCA Civ 1373; [2009] 1 WLR 1565; [2009] Bus LR 794 , CA

The following additional cases were cited in argument:

A v Secretary of State for the Home Department [2004] UKHL 56; [2005] 2 AC 68; [2005] 2 WLR 87; [2005] 3 All ER 169 , HL(E)
All Party Parliamentary Group on Extraordinary Rendition v Information Comr [2011] UKUT 153 (AAC); [2011] 2 Info LR 75 , UT
Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109; [1988] 3 WLR 776; [1988] 3 All ER 545 , HL(E)
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Bank Mellat v HM Treasury (No 2) [2013] UKSC 38; [2013] UKSC 39; [2014] AC 700; [2013] 3 WLR 179; [2013] 4 All ER 495; [2013] 4 All ER 533 , SC(E)
Bowen-West v Secretary of State for Communities and Local Government [2012] EWCA Civ 321; [2012] Env LR 448 , CA
Browning v Information Comr [2013] UKUT 236 (AAC); [2013] 2 Info LR 1, UT; [2014] EWCA Civ 1050; [2014] 1 WLR 3848 , CA
Brumarescu v Romania (2001) 33 EHRR 887 , GC

Validity under the FOIA 2000: the constitutional aspect

51. When one considers the implications of section 53(2) in the context of a situation where a court, or indeed any judicial tribunal, has determined that information should be released, it is at once apparent that this argument has considerable force. A statutory provision which entitles a member of the executive (whether a Government Minister or the Attorney General) to overrule a decision of the judiciary merely because he does not agree with it would not merely be unique in the laws of the United Kingdom. It would cut across two constitutional principles which are also fundamental components of the rule of law.

52. First, subject to being overruled by a higher court or (given Parliamentary supremacy) a statute, it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive. Secondly, it is also fundamental to the rule of law that decisions and actions of the executive are, subject to necessary well established exceptions (such as declarations of war), and jealously scrutinised statutory exceptions, reviewable by the court at the suit of an interested citizen. Section 53 , as interpreted by the Attorney General's argument in this case, flouts the first principle and stands the second principle on its head. It involves saying that a final decision of a court can be set aside by a member of the executive (normally the minister in charge of the very department against whom the decision has been given) because he does not agree with it. And the fact that the member of the executive can put forward cogent and/or strongly held reasons for disagreeing with the court is, in this context, nothing to the point: many court decisions are on points of controversy where opinions (even individual judicial opinions) may reasonably differ, but that does not affect the applicability of these principles.

53. In *M v Home Office [1994] 1 AC 377* , 395, Lord Templeman in characteristically colourful language criticised "the proposition that the executive obey the law as a matter of grace and not as a matter of necessity [as] a proposition which would reverse the result of the Civil War". The proposition that a member of the executive can actually overrule a decision of the judiciary because he does not agree with that decision is equally remarkable, even if one allows for the fact that the executive's overruling can be judicially reviewed. Indeed, the notion of judicial review in such circumstances is a little quaint, as it can be said with some force that the rule ***1819** of law would require a judge, almost as a matter of course, to quash the executive decision.

54. The constitutional importance of the principle that a decision of the executive should be reviewable by the judiciary lay behind the majority judgments in the famous case, *Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147* , where the House of Lords held that a statutory provision, which provided that any "determination by the commission" in question "shall not be called in question in any court of law", did not prevent the court from deciding whether a purported decision of the commission was a nullity, on the ground that the commission had misconstrued a provision defining their jurisdiction. Lord Reid said at p 170D that if it had been intended "to prevent any inquiry [in all circumstances] I would have expected to find something much more specific than the bald statement that a determination shall not be called in question in any court of law". And see per Lord Diplock in *In re Racal Communications Ltd [1981] AC 374* , 383, where he held that there is a presumption that Parliament did not intend an administrative body to be the final arbiter on questions of law.

55. This is scarcely a recent development. In *R v Cheltenham Comrs (1841) 1 QB 467* , a statute provided that any decision of the Quarter Sessions as to the levying of certain rates was to be "final, binding, and conclusive to all intents and purposes whatsoever", and that no order made in that connection "shall … be removed or removable by certiorari, or any other writ or process whatsoever, …; any law or statute to the contrary thereof in anywise notwithstanding". Despite this, Lord Denman CJ robustly stated at p 474 that

> "the clause which takes away the certiorari does not preclude our exercising a superintendence over the proceedings, so far as to see that what is done shall be in pursuance of the statute. The statute cannot affect our right and duty to see justice executed: and, here, I am clearly of opinion that justice has not been executed."

56. The importance of the right of citizens to seek judicial review of actions and decisions of the executive, and its consequences in terms of statutory interpretation, was concisely explained by Baroness Hale of Richmond in *R (Jackson) v Attorney General [2006] 1 AC 262* , para 159. She said that "the courts will, of course, decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear". The same point had been made, albeit in more general terms, by Lord Hoffmann in *R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115* , 131, where he said:

> "the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, ***1820*** apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

57. At least equally in point is the proposition set out by Lord Reed JSC in *AXA General Insurance Ltd v HM Advocate [2012] 1 AC 868* , para 152, that:

> "The principle of legality means not only that Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words, but also that it cannot confer on another body, by general or ambiguous words, the power to do so."

In support of this proposition, Lord Reed JSC cited two passages from the decision of the House of Lords in *R v Secretary of State for the Home Department, Ex p Pierson [1998] AC 539* . At p 575, Lord Browne-Wilkinson said that:

> "A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament."

To much the same effect, Lord Steyn said, at p 591, that "Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law".

58. Accordingly, if section 53 is to have the remarkable effect argued for by Mr Eadie QC for the Attorney General, it must be "crystal clear" from the wording of the FOIA 2000 , and cannot be justified merely by "general or ambiguous words". In my view, section 53 falls far short of being "crystal clear" in saying that a member of the executive can override the decision of a court because he disagrees with it. The only reference to a court or tribunal in the section is in subsection (4)(b) which provides that the time for issuing a certificate is to be effectively extended where an appeal is brought under section 57 . It is accepted in these proceedings that that provision, coupled with the way that the tribunal's powers are expressed in sections 57 and 58 , has the effect of extending the power to issue a section 53 certificate to a decision notice issued or confirmed by a tribunal or confirmed by an appellate court or tribunal. But that is a very long way away indeed from making it "crystal clear" that that

power can be implemented so as to enable a member of the executive effectively to reverse, or overrule, a decision of a court or a judicial tribunal, simply because he does not agree with it.

59. All this militates very strongly in favour of the view that where, as here, a court has conducted a full open hearing into the question of whether, in the light of certain facts and competing arguments, the public interest favours disclosure of certain information and has concluded for reasons given in a judgment that it does, section 53 cannot be invoked effectively to overrule that judgment merely because a member of the executive, considering the same facts and arguments, takes a different view.
**1821*

Validity under the FOIA 2000: previous authority

60. There are three previous decisions of the Court of Appeal which bear on the question whether Parliament can have intended a member of the executive to be able freely to consider, or reconsider, for himself the very issues, on the same facts, which had been determined by another person or a tribunal. I agree with Lord Wilson JSC that (quite apart from the fact that they are not binding on us) none of these decisions, or the reasoning which they contain, would be directly determinative of the instant appeal. However, they cast some light on the appropriate approach to be adopted in a case where two separate bodies are called on by statute to determine the same issue.

61. In R v Warwickshire County Council, Ex p Powergen plc (1997) 96 LGR 617 , it was held that a county council, as highway authority, was precluded from refusing to agree to access works to a proposed development on the ground that the access was unsafe, because that was a ground which a planning inspector, after a full inquirey, held that the district council (adopting the view of the county council) had not made out as a reason for refusing planning permission for the development. Simon Brown LJ stated, at p 626, that "because of its independence and because of the process by which it is arrived at", the inspector's conclusion had become "the only properly tenable view on the issue of road safety".

62. In *R v Secretary of State for the Home Department, Ex p Danaei [1998] INLR 124* , an immigration adjudicator, after a hearing, had rejected the applicant's asylum appeal, but accepted that he had left Iran because he had had an adulterous relationship; it was held that the applicant's subsequent application for special leave to remain could not be rejected by the Home Secretary on the ground that he did not accept that the applicant had had such a relationship. Simon Brown LJ suggested that, unless "the adjudicator's … conclusion was … demonstrably flawed" or "fresh material has since become available", the Home Secretary had to accept the adjudicator's finding.

63. In *R (Bradley) v Secretary of State for Work and Pensions (Attorney General intervening) [2009] QB 114* , the Secretary of State was held to have wrongly rejected findings of maladministration made by the ombudsman. The ombudsman's investigation had been carried out in private, as required by the relevant legislation, and she had adopted a full, albeit not adversarial, written procedure. Sir John Chadwick said, at para 51, that the Secretary of State was not bound to follow the ombudsman's view, but that "his decision to reject the ombudsman's findings in favour of his own view" must not be "irrational having regard to the legislative intention which underlies the [relevant] Act". At para 91, Sir John said that it was "not enough that the Secretary of State has reached his own view on rational grounds", and that "he must have a reason (other than simply a preference for his own view) for rejecting a finding which the ombudsman has made after an investigation under [statutory] powers". It seems to me that this involved setting a somewhat lower threshold for departing from the earlier decision than Powergen or Danaei .

64. In Bradley , as in this case, the two decisions were provided for in the same statute as part of an overall procedure, whereas in Powergen the two decisions arose under different statutory codes—relating, respectively, to planning law and highways law. Danaei was something of a hybrid, as the **1822* two decisions were made under different statutes (the Asylum and Immigration Appeals Act 1993 and the Immigration Act 1971), but they were both part of the overall statutory asylum and immigration code, although not part of the same overall procedure. As in Bradley , it seems to me to follow from the fact that the two decisions in this case are provided for in the same statute and as part of a single procedure, that the second decision-maker, the accountable person, cannot always be obliged to follow the view of the first decision-maker, the Commissioner (or, on an appeal, the tribunal or the courts): otherwise there would be no point in providing for a second decision. However, that does not ultimately assist on the issue between the parties, namely the circumstances in which the accountable person is allowed to refuse to follow the earlier decision.

65. As to that aspect, Mr Evans's case here is, at least in principle, significantly stronger than that of the successful applicant in the three Court of Appeal cases. The first decision (the equivalent of the Upper Tribunal's decision in this case) was reached after a hearing in Powergen and in Danaei and after a full investigation in Bradley . However, in none of those three cases was there a hearing before a judicial body, as in the present case. Even the inspector in Powergen and the adjudicator in Danaei

were not judicial entities (as an immigration adjudicator was not at that time a member of the judiciary). Additionally, unlike the applicant in Powergen and in Danaei , Mr Evans had no opportunity to make submissions to the second decision-maker. I am unimpressed by the point that the accountable person under section 53 is in a stronger position than the Secretary of State in Bradley , because he has express statutory power to disagree with a certificate: it was inherent in the statutory provisions, indeed it was essential to the reasoning of the Court of Appeal, in Bradley that the Secretary of State could disagree with the decision of the ombudsman.

Validity under the FOIA 2000: provisional view

66. Such comparisons with other cases can, however, only be of limited assistance: what is of more importance is to seek to identify the relevant principles. In Bradley , para 70, Sir John Chadwick did just that and suggested that there were five applicable propositions. At least for present purposes, I would reformulate and encapsulate those propositions in the following two sentences. In order to decide the extent to which a decision-maker is bound by a conclusion reached by an adjudicative tribunal in a related context, regard must be had to the circumstances in which, and the statutory scheme within which, (i) the adjudicative tribunal reached its conclusion, and (ii) the decision-maker is carrying out his function. In particular, the court will have regard to the nature of the conclusion, the status of the tribunal and the decision-maker, the procedure by which the tribunal and decision-maker each reach their respective conclusions (eg, at the extremes, (i) adversarial, in public, with oral argument and testimony and cross-examination, or (ii) investigatory, in private and purely on the documents, with no submissions), and the role of the tribunal and the decision-maker within the statutory scheme.

67. Although Sir John expressed his propositions so as to apply to "findings of fact", it seems to me that they must apply just as much to opinions or balancing exercises. The issue is much the same on an appeal or review, namely whether the tribunal was entitled to find a particular fact **1823* or to make a particular assessment. Anyway, it is clear from Powergen that an assessment as to whether an access onto a highway would be safe fell within the scope of his propositions. Indeed, the ombudsman's decision in Bradley itself seems to me to have involved issues as to which she had to make assessments or judgments, such as whether the department concerned should have done more and whether some failures amounted to maladministration: see at para 27 of Sir John Chadwick's judgment.

68. In these circumstances, it appears to me that there is a very strong case for saying that the accountable person cannot justify issuing a section 53 certificate simply on the ground that, having considered the issue with the benefit of the same facts and arguments as the Upper Tribunal, he has reached a different conclusion from that of the Upper Tribunal on a section 57 appeal. I would summarise my reasons as follows.

69. First, and most importantly, the two fundamental principles identified in para 52 above. Secondly, (i) the fact that the earlier conclusion was reached by a tribunal (a) whose decision could be appealed by the departments, (b) which had particular relevant expertise and experience, (c) which conducted a full hearing with witnesses who could be cross-examined, (d) which sat in public, and had full adversarial argument, and (e) whose members produced a closely reasoned decision, coupled with (ii) the fact that the later conclusion was reached by an individual who, while personally and ex officio deserving of the highest respect, (a) consulted people who had been involved on at least one side of the correspondence whose disclosure was sought, (b) received no argument on behalf of the person seeking disclosure, (c) received no fresh facts or evidence, and (d) simply took a different view from the tribunal.

70. However, before one can fairly conclude that a section 53 certificate cannot be issued to override a decision of a court simply because the accountable person disagrees with the conclusion reached by the court on a section 57 appeal, it is necessary to address two questions. First and most obviously, if this constraint applies to the issue of a section 53 certificate after a determination by the Upper Tribunal, in what circumstances could such a certificate be issued once the Upper Tribunal (or an appellate court) has issued or approved a decision notice? Secondly, does the same constraint apply when there has been no appeal from the Commissioner, and, if so, how does the power to issue a certificate under section 53 interrelate with the right of appeal under section 57 ?

Validity under the FOIA 2000: implications of provisional view

71. If section 53 does not entitle an accountable person to issue a certificate simply on the ground that he disagrees with the determination of a court to uphold, or issue, a decision notice, then, given that it is agreed that section 53 can be invoked once a court has reached such a determination, the question arises: on what grounds can it be issued in such circumstances? The

112. I agree with Lord Dyson MR that it is not possible to infer this view from any specific words, phrases, or conclusions in the Certificate. However, it is clear from the Certificate, in my view at any rate, that the Attorney General was firmly of the view that none of the letters from the Prince of Wales to ministers should be disclosed. Apart from the overall tenor of the Attorney General's reasoning, two specific points strike me as significant. First, he clearly took the view that disclosure against the will of the Prince of any letter was objectionable. Secondly, he was wholly unimpressed with the argument that disclosure of the advocacy letters should be ordered because the contents of some of the letters had been made public.

The 2003 Directive: conclusions as to its effect

113. Accordingly, if (contrary to my conclusion expressed in paras 86–89 above), the Certificate had been valid so far as the FOIA 2000 was concerned, I would have concluded that the effect of the 2003 Directive was to invalidate the Certificate in relation to the environmental information, but not in relation to the non-environmental information, in the advocacy correspondence.

Conclusions

114. For these reasons, which, with the minor exception of paras 109–112 above, largely accord with those in the judgment of Lord Dyson MR in the Court of Appeal, I would dismiss this appeal.

115. It is, I think, worth mentioning that the same fundamental composite principle lies behind the reason for dismissing this appeal on each of the two grounds which are raised. That principle is that a decision of a judicial body should be final and binding and should not be capable of being overturned by a member of the executive. On the second ground, which involves EU law, the position is relatively straightforward, at least as I see it: **1834* the relevant legislative instrument, the 2003 Directive, expressly gives effect to that fundamental principle through the closing words of article 6(2) and the opening sentence of article 6(3) . On the first ground, which involves domestic law, the position is more nuanced: the relevant legislative instrument, the FOIA 2000 , through section 53 , expressly enables the executive to overrule a judicial decision, but only "on reasonable grounds", and the common law ensures that those grounds are limited so as not to undermine the fundamental principle, or at least to minimise any encroachment onto it.

LORD MANCE JSC (with whom BARONESS HALE OF RICHMOND DPSC agreed)

Introduction

116. This is an application for judicial review of a certificate issued by the Attorney General under section 53 of the Freedom of Information Act 2000 ("FOIA") to prevent disclosure of written communications passing between the Prince of Wales and various Government Departments during the period 1 September 2004 to 1 April 2005. Disclosure of these communications has been requested by Mr Rob Evans, a journalist with The Guardian.

117. The Departments' refusal of disclosure was upheld by the Information Commissioner. Mr Evans's appeal was transferred to the Upper Tribunal, where the Information Commissioner was the respondent and the various Departments were interested parties. The Information Commissioner now no longer resists disclosure, so I can in what follows simply refer to the Departments as the party resisting. The Upper Tribunal (Walker J, Upper Tribunal Judge John Angel and Ms Suzanne Cosgrave) heard extensive evidence and on 18 September 2012 allowed Mr Evans's appeal by a decision with reasons extending to 251 paragraphs, with open annexes extending to a further 297 paragraphs.

118. The Attorney General on 16 October 2012 issued his certificate stating that as an accountable person under section 53(8) of FOIA :

> "I have on reasonable grounds formed the opinion that, in respect of the requests concerned, there was no failure to comply with section 1(1)(b) of the Act or regulation 5(1) of the Environmental Information Regulations 2004 ."

Where such a certificate is issued, any decision notice ceases under section 53(2) to have any effect. Mr Evans challenges the legitimacy of that certificate.

119. The Divisional Court (Lord Judge CJ, Davis LJ and Globe J) dismissed the challenge. The Court of Appeal (Lord Dyson MR and Richards and Pitchford LJJ) allowed Mr Evans's appeal. The Attorney General now appeals against that decision by permission of the Court of Appeal.

120. The background circumstances and law have been set out in the judgment of Lord Neuberger of Abbotsbury PSC, which I have had the benefit of being able to read before preparing this judgment, and I need not repeat them. I have also had the benefit of reading Lord Wilson and Lord Hughes JJSC's judgments.
**1835*

121. Section 1(1)(b) of FOIA gives a person making a request to a public authority a general right to have communicated information held by that authority, subject to exemptions introduced by section 2 . Regulation 5(1) of the Environmental Information Regulations 2004 contains a specific right in respect of environmental information, intended to implement the requirements of Parliament and Council Directive 2003/4/EC on public access to environmental information. The provisions of FOIA apply to this specific right with some modifications, by virtue of regulation 18 . Both rights are expressly made subject to section 53 , set out by Lord Neuberger PSC in para 17. In the case of environmental information, this is by virtue of regulation 18(6) . Under section 53(2) a certificate may be served (as this one was) not later than 20 working days following either a decision notice or enforcement notice given by the Information Commissioner or the determination or withdrawal of an appeal.

The issues

122. The following issues arise: (i) whether the Attorney General's statement that he had "on reasonable grounds" formed the opinion that there was no failure to comply with section 1(1)(b) or regulation 5(1) was one which he was entitled to make, having regard in particular to the decision and reasoning of the Upper Tribunal, and (ii) whether, in any event, regulation 18(6) complies with article 6 of Parliament and Council Directive 2003/4/EC ; if it does not, then it is common ground that regulation 18(6) is invalid, and in that case a subsidiary issue arises: (iii) whether the certificate can stand even in relation to the non-environmental information which it covers.

The first issue— the test for issue of a certificate

123. On the first issue, there is a significant difference of principle between Lord Neuberger PSC and Lord Wilson JSC. Lord Neuberger PSC highlights the incongruity of a minister or officer of the executive, however distinguished, overriding a judicial decision. The incongruity is if anything more marked in the case of a court of record like the Upper Tribunal. This leads him to confine the operation of section 53 to marginal circumstances which could only rarely arise. But Lord Neuberger PSC also notes that further incongruity could arise if a certificate were more readily capable of being issued at the earlier stage of a non-judicial decision by the Information Commissioner. Unless the operation of section 53 were in this case also confined, the scope for issuing a certificate would vary according to whether the Information Commissioner's decision notice was for or against disclosure. None the less, Lord Neuberger PSC considers, provisionally, that the scope is not as confined in this case as after a tribunal decision, but that the existence of a right of appeal, on both law and fact, against an Information Commissioner's decision, would serve as some form of constraint.

124. Lord Neuberger PSC himself recognises, and Lord Wilson JSC elaborates, some of the problems which this construction faces. I can myself subscribe generally to the views expressed by Lord Wilson JSC in paras 171, 172 and 174–179 of his judgment. I consider that section 53 must have been intended by Parliament to have, and can and should be read as having, a
**1836* wider potential effect than that which Lord Neuberger PSC has attributed to it.

125. Lord Wilson JSC expresses this effect as being to enable the Attorney General to arrive at a different evaluation of the public interests. He takes the view that the fact that the statutory override is expressly conferred by FOIA distinguishes this scheme from those under consideration in the three authorities. I note, however, that, under the ombudsman scheme considered in *R (Bradley) v Secretary of State for Work and Pensions [2009] QB 114* the Court of Appeal held that the ombudsman's

findings of maladministration were not as a matter of law binding on the minister. Nevertheless, the Court of Appeal was, in Sir John Chadwick's words, at para 91:

> "not persuaded that the Secretary of State was entitled to reject the ombudsman's finding merely because he preferred another view which could not be characterised as irrational … it is not enough that the Secretary of State has reached his own view on rational grounds … he must have a reason (other than simply a preference for his own view) for rejecting a finding which the ombudsman has made after an investigation under the powers conferred by the Act."

126. To that extent therefore, the decision indicates that there can be constraints on executive departure from the considered findings of even a non-judicial body established to investigate and make recommendations. But, as Lord Neuberger PSC observes, the reasoning in Bradley appears to set a somewhat lower threshold for departing from the earlier decision than the Court of Appeal thought appropriate in the different circumstances under consideration in R v Warwickshire County Council, Ex p Powergen plc (1997) 96 LGR 617 and *R v Secretary of State for the Home Department, Ex p Danaei [1998] INLR 124* .

127. In Bradley , the differences between acting rationally or irrationally, simply preferring one's own view and having a reason for rejecting a finding were not further examined in the judgments, and the Court of Appeal in its actual decision appears to have contented itself with examining whether the Secretary of State did or did not act rationally: see paras 95–96 and 125.

128. Ultimately, the test applicable in relation to the first issue must be context-specific, in the sense that it must depend on the particular legislation under consideration, here the FOIA and the Regulations, and on the basis on which the Attorney General was departing from the decision notice or appeal decision. Mr James Eadie QC submits that the Attorney General could, instead of appealing, even take a different view from the Information Commissioner or Tribunal on a question of law, but accepts that, in that event, the correctness of his view of the law could be tested by judicial review. As to findings or evaluations of fact, he accepted at one point that something more than mere rationality was required under section 53 if the Attorney General was to depart from a finding or evaluation of facts. He went on to explain that the court must apply an objective standard, by asking whether the certificate expressed a view that was a reasonable view for the Attorney General to hold. A different view about or evaluation of the public interest was, in his submission, exactly what section 53 was intended to permit. Ultimately, therefore, it appears that Mr Eadie was contending **1837* for a test close, if not exactly equivalent, to rationality on the part of the Attorney General.

129. On any view, the Attorney General must under the express language of section 53(2) be able to assert that he has reasonable grounds for considering that disclosure was not due under the provisions of FOIA . That is, I consider, a higher hurdle than mere rationality would be. Under section 53(6) he must also express his reasons for this opinion, unless, under section 53(7) this would involve disclosure of exempt information. On judicial review, the reasonable grounds on which the Attorney General relies must be capable of scrutiny. (The only doubt, discussed by Lord Wilson JSC in para 181, is whether the court can consider in a closed material procedure any of the material of which disclosure is sought, in the same way that the Upper Tribunal was able to. That doubt does not require resolution on this appeal.)

130. When the court scrutinises the grounds relied on for a certificate, it must do so necessarily against the background of the relevant circumstances and in the light of the decision at which the certificate is aimed. Disagreement with findings about such circumstances or with rulings of law made by the tribunal in a fully reasoned decision is one thing. It would, in my view, require the clearest possible justification, which might I accept only be possible to show in the sort of unusual situation in which Lord Neuberger PSC contemplates that a certificate may validly be given. This is particularly so, when the Upper Tribunal heard evidence, called and cross-examined in public, as well as submissions on both sides. In contrast, the Attorney General, with all due respect to his public role, did not. He consulted in private, took into account the views of Cabinet, former ministers and the Information Commissioner and formed his own view without inter partes representations. But disagreement about the relative weight to be attributed to competing interests found by the tribunal is a different matter, and I would agree with Lord Wilson JSC that the weighing of such interests is a matter which the statute contemplates and which a certificate could properly address, by properly explained and solid reasons.

Appendix 5 – Case Law

b. R (Stonegate) v Horsham

*138 R. (on the application of Stonegate Homes Ltd) v Horsham DC

No Substantial Judicial Treatment

Court
Queen's Bench Division (Administrative Court)

Judgment Date
13 October 2016

Report Citation
[2016] EWHC 2512 (Admin)
[2017] Env. L.R. 8

Queen's Bench Division (Administrative Court)

Patterson J

6 May 2016

Built-up areas; EU law; Neighbourhood development plans; Reasons; Regional spatial strategies; Residential development; Strategic environmental assessments;

H1 *Judicial review—Town and Country Planning—strategic environmental assessment—Neighbourhood Plan—whether obligations under Directive 2001/42 complied with—whether duty under reg.19 of the Neighbourhood Planning (General) Regulations 2012 discharged—whether reasonable alternatives lawfully identified and assessed—whether adequate reasons given for findings that EU obligations met*

H2. The claimants (S) were developers who had appealed refusal by the defendant (H) of their application for planning permission for housing development. S made a claim under s.61N of the Town and Country Planning Act 1990 to challenge H's decision to make the Henfield Neighbourhood Plan (HNP). The claim was on three grounds: (1) H had failed to assess lawfully reasonable alternatives to the spatial strategy as established by the HNP; (2) H had failed to consider any alternatives to the Built-Up Area Boundary (BUAB) as established in the HNP and had failed to act rationally in the selection of the BUAB; and (3) H and/or the examining inspector had failed to give any or adequate reasons as to why the HNP met EU obligations under the Strategic Environmental Assessment (SEA) Directive . The Directive made provisions regarding the evaluation of likely environmental effects of plans and reasonable alternatives, including the provision of reasons for selecting the alternatives considered and the means of assessing those. S had not challenged the independent examiner's report of the HNP. Following approval by a referendum, H had been under a duty to make the plan, unless it considered that this would breach, or otherwise be incompatible with any EU obligation. Accordingly, unless S could establish that H could not lawfully consider that the plan was incompatible with any EU obligation, the claim would fail. S submitted that alternative "Option C" in the HNP had been rejected on the grounds of unsustainable pressure on the local road system, and that this had been inconsistent with the findings of an inspector in considering an appeal relating to development in the area.

H3. **Held** , in allowing the claim:

H4. (1) There was no evidence to support the view expressed for the rejection of Option C in the HNP. The requirement under the Directive, that alternatives were to be assessed in a comparable manner and on an accurate basis had simply not *139 been met. The independent examiner's conclusion on compliance of the HNP with EU obligations had been wrong.

The obligation under the Directive was to ensure that the consideration of reasonable alternatives was based upon an accurate picture of what reasonable alternatives were. That had not been done in the present case. Not only had the conclusion been wrong but, in the circumstances, it had been irrational, given the absence of an evidence base. That report had then tainted H's decision. H had been under an independent duty to set out its decision under reg.19 of the Neighbourhood Planning (General) Regulations 2012 as to why it made the plan. It had clearly been unable to make a lawful decision given that the plan breached and was incompatible with EU obligations. It followed that the assessment of reasonable alternatives within the SEA process had been flawed and that making of the HNP incompatible with EU obligations. H's decision to make the plan had thus been irrational.

H5. (2) There did not appear to have been any assessment of the environmental impact of the BUAB. There was no explanation as to why the proposed delineation was preferred to any alternatives. The issue had been raised by S in representations on the draft HNP but, apparently, had been ignored by the independent examiner, H and others in the plan making process. It followed that this approach was also in breach of EU obligations.

H6. (3) As those flaws in the plan-making system meant that the HNP was in breach of the Directive, the reasons given were bound to be, and were, inadequate.

H7 Cases referred to:

Ashdown Forest Economic Development LLP v Secretary of State for Communities and Local Government [2015] EWCA Civ 681; [2016] P.T.S.R. 78; [2016] Env. L.R. 2
Fox Strategic Land & Property Ltd v Secretary of State for the Communities and Local Government [2012] EWCA Civ 1198; [2013] 1 P. & C.R. 6
North Wiltshire DC v Secretary of State for the Environment (1993) 65 P. & C.R. 137; [1992] 3 P.L.R. 113; [1992] J.P.L. 955; CA (Civ Div)
R. (on the application of Batchelor Enterprises Ltd) v North Dorset DC [2003] EWHC 3006 (Admin) ; [2004] J.P.L. 1222
R. (on the application of Bradley) v Secretary of State for Work and Pensions [2008] EWCA Civ 36; [2009] Q.B. 114; [2008] 3 W.L.R. 1059
R. (on the application of Enfield LBC) v Mayor of London [2008] EWCA Civ 202; [2008] Env. L.R. 33; [2008] B.L.G.R. 615
R. (on the application of Evans) v Attorney General [2015] UKSC 21; [2015] A.C. 1787; [2015] 2 W.L.R. 813; [2015] Env. L.R. 34
R. v Warwickshire CC Ex p. Powergen Plc (1998) 75 P. & C.R. 89; [1997] 3 P.L.R. 62; [1998] J.P.L. 131

H8 Legislation referred to:

Town and Country Planning Act 1990 ss.61E , 61N
Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment (SEA) arts 1 – 3 , 5 , 8 & 9
Planning and Compulsory Purchase Act 2004 ss.38 , 38A , 38B & 38C and Sch.4B
Localism Act 2011
Neighbourhood Planning (General) Regulation 2012 (S.I. 2012/637) reg.19 ***140**

H9 Representation

Mr M. Lowe QC and Mr R. Williams , instructed by Russell-Cooke, appeared on behalf of the claimants.
Mr D. Lintott , instructed by Sharpe Pritchard, appeared on behalf of the defendant.

Judgment

Patterson J:

Introduction

1. This is a claim under s.61N of the Town and Country Planning Act 1990 (as amended) (the 1990 Act) which seeks to challenge the decision of the defendant on 27 April 2016 to make the Henfield Neighbourhood Plan (HNP). That decision was made following a referendum held on 12 April 2016 when the HNP was passed with a vote of 94.3 per cent of the voters.

2. The claimants are developers who have been promoting a site known as Sandgate Nursery, on the western side of Henfield, as a site for the development of 72 dwellings. A planning application was refused by the defendant on 25 November 2014. That refusal was appealed by the claimants. The decision remains with the Secretary of State for determination.

3. The claim is brought on three grounds:

i) That the defendant had failed to lawfully assess reasonable alternatives to the spatial strategy as established by the HNP and, in particular, the alternative of permitting development on the western edge of Henfield;
ii) That the defendant had failed to consider any alternatives to the Built-Up Area Boundary (BUAB) as established in the HNP and had failed to act rationally in the selection of the BUAB;
iii) That the defendant and/or the examining inspector failed to give any or adequate reasons as to why the HNP met EU obligations.

4. The defendant submits:

i) That the challenge is limited in scope by s.38A(4) and s.38A(6) of the 2004 Act to a consideration of whether the making of the neighbourhood development order would breach or would otherwise be incompatible with any EU obligation or any of the Convention rights;
ii) Even if the scope of challenge is not so limited the option of developing land to the west of Henfield and that of including the "Barratt site" within the BUAB of Henfield had been adequately dealt with by the examiner and the defendant in a proportionate way and the reasons that had been advanced were adequate.

5. An acknowledgement of service and summary grounds of resistance were filed by the interested party, Henfield Parish Council, on 3 June 2016, which submit:

i) That it lawfully assessed development sites put forward during the call for sites including those on the western edge of Henfield;
ii) It did consider alternatives to the BUAB and it acted rationally in the selection of the BUAB. ***141**

Apart from submission of those grounds the Parish Council has played no active role in the proceedings before me.

6. On 27 June 2016 Gilbart J ordered a "rolled-up hearing".

Legal framework

Development plans

7. The development plan has a particular significance in the operation of the planning system in England. Section 38(6) of the Planning and Compulsory Purchase Act 2004 (the 2004 Act) provides:

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

Neighbourhood development plans

8. Amendments to the 2004 Act were made by the Localism Act 2011 . Those amendments provide for a process whereby parish councils or bodies designated as neighbourhood forums can initiate the making of a neighbourhood development plan. The provisions provide for an independent examination of a neighbourhood development plan. The examiner may recommend that the plan, with or without modification, is submitted to a referendum. If more than half of those voting at a referendum vote in favour of the plan, the local planning authority must make the neighbourhood development plan.

9. The material provisions of s.38A of the 2004 Act provide:

> "(1) Any qualifying body is entitled to initiate a process for the purpose of requiring a local planning authority in England to make a neighbourhood development plan.
>
> (2) A 'neighbourhood development plan' is a plan which sets out policies (however expressed) in relation to the development and use of land in the whole or any part of a particular neighbourhood area specified in the plan.
>
> (3) Schedule 4B to the principal Act , which makes provision about the process for the making of neighbourhood development orders, including—
>
> (a) provision for independent examination of orders proposed by qualifying bodies, and
>
> (b) provision for the holding of referendums on orders proposed by those bodies,
>
> is to apply in relation to neighbourhood development plans (subject to the modifications set out in s.38C(5) of this Act).
>
> (4) A local planning authority to whom a proposal for the making of a neighbourhood development plan has been made—
>
> (a) must make a neighbourhood development plan to which the proposal relates if in each applicable referendum under that Schedule (as so applied) more than half of those voting have voted in favour of the plan, and ***142**
>
> (b) if paragraph (a) applies, must make the plan as soon as reasonably practicable after the referendum is held."

boundaries and was dismissed as it resulted in too few new homes being allocated. Alternative option B confined allocations to all the edges of the village and allowed for greater development at Small Dole. That was dismissed due to the scale of negative impact on environmental measures. Alternative option C favoured sites on the western boundary of the village that consolidated the recent consent at West End Lane. That, too, scored badly overall as any further significant development in that area, which lies furthest from the village centre, would place unsustainable pressure on the local road system and infrastructure: see para.7.11.

44. The wording in the final SEA on option C is identical to that contained in the Sustainability Appraisal in December 2014, that published in March 2015 and that published in August 2015.

45. In a note produced of a planning workshop on 7 July 2014 into the HNP on housing and development it was noted that the recent planning appeals/consents in Henfield had had an impact on local public opinion and, significantly:

> "Sites in Henfield closer to the village services on its eastern edge would have less of an impact in terms of traffic movements generated by new residents (but marginal in terms of commuting, shopping, leisure trips)."

Submissions

46. To a great extent the claimants' grounds of challenge overlap. For ease I have retained their original numbering but as will become apparent much of the reasoning applies to all and the rest of this judgment should be read with that in mind.

Ground 1(a): Assessment of alternatives to the spatial strategy within the Hnp

47. The claimants contend that there were three basic errors, namely:

i) That there was an unlawful departure from/failure to grapple with previous findings on a materially similar issue;
ii) That there was a lack of any evidential foundation for the conclusions that were drawn;
iii) There was a premature fixing of the spatial strategy.

48. The claimants rely upon the principle that where an issue has previously been the subject of a finding of fact or judgment by an expert independent tribunal in a related context the decision-maker must take into account and give appropriate respect to the conclusions of that tribunal. The weight to be given to the conclusions of the other tribunal and the ease with which the decision-maker can depart from previous conclusions of the tribunal depends upon the context. However, in all ***151** cases it is incumbent on the decision-maker to grapple with the conclusions of the tribunal and, if departing from them, to give reasons for so doing.

49. In support of that proposition the claimants rely upon the well known cases of *R. v Warwickshire County Council Ex p. Powergen Plc (1998) 75 P. & C.R. 89* , *R. (Bradley) v Work and Pensions Secretary [2008] EWCA Civ 36* , *R. (Mayor of London) v Enfield London Borough Council [2008] EWCA Civ 202* and R. (Bachelor Enterprises Limited) v North Dorset District Council [2003] EWHC 3006 (Admin) and *R. (Evans) v Attorney General [2015] UKSC 21* .

50. From those cases the claimants make the following five submissions:

i) Both the local planning authority and the parish council were dealing, in the HNP, with the same proposition made by the parish council in the Barratt appeal. The only distinction was of size of development.
ii) The proposition was the same as that which was put to the inspector on the sustainability of the Barratt site and rejected by him after he had heard evidence.
iii) The Barratt appeal inspector had heard evidence over several days.
iv) Neither the defendant nor the parish council began to grapple with the significance of the Barratt decision or to consider whether that appeal decision constituted a change of circumstances that might have warranted a different decision on spatial strategy in the HNP.
v) The decision made in the HNP was of an absolute nature, namely, that development on the west would "lead to unsustainable pressure on the local road network".

51. The second strand of cases on which the claimants rely are those which highlight the principle of consistency in decision-making. The claimants rely on *North Wiltshire District Council v Secretary of State for the Environment (1992) 65 P. & C.R. 137* and *R. (Fox Strategic Land & Property Limited) v Secretary of State for Communities and Local Government [2012] EWCA Civ 1198* . The claimants submit that although the decisions relate to individual planning applications there is no logical reason why the principle of consistency should not apply equally to the context of plan-making.

52. The defendant contends that a plan-making exercise is different to what was being considered in the cases of *Powergen* , *Evans* , Bachelor and *North Wiltshire* . The plan-making authority and independent inspector were looking at comparative sustainability. What was before them was an evaluative judgment as to where development should go within the neighbourhood. A court can only intervene if the decisions made were irrational.

53. The timing of the challenge is important to the overall context. The independent examiner's report has not been challenged by the claimants at any stage. The February 2016 decision on the part of the defendant accepted the recommendation and modifications of the examiner that the HNP met the basic conditions in para.8(2) of Sch.4B of the 1990 Act which included a determination as to the compatibility with EU obligations. After the referendum on 12 April 2016 with 94.3 per cent of the votes cast agreeing that the HNP be used in the determination of planning applications the defendant was under a duty to make the plan subject only to s.38A(6) which provides that local planning authorities are not subject to the duty if they consider that the making of the plan would breach or otherwise be incompatible with any EU obligation. Unless the claimants can establish that the ***152** defendant could not lawfully consider that the plan was incompatible with any EU obligation the claim must fail.

Discussion and conclusions

54. Alternative option C which related to sites on the western boundary of Henfield was dismissed in the SA/SEA report and in the HNP because "any further significant development in that area which lies furthest from the village centre would place unsustainable pressure on the local road system." There was, therefore, a live issue as to whether development on the western side would place unsustainable pressure on the local road system. As a matter of fact the western area lay further from the village centre but that was not the rationale for rejecting the area in the SA/SEA or in the HNP.

55. The Barratt application on land north of West End Lane was made on 29 April 2014. The appeal into the refusal of planning permission by the defendant was heard over four days at the end of March and the beginning of April 2014. A decision letter was issued on 2 June 2014. One of the reasons for refusal was a highways reason. That was withdrawn by the council at appeal as a result of an agreement between Barratt and the Highways Authority on highway works and contributions. The issue of transportation though remained live at the appeal as the parish council and other interested parties

maintained their objections. As a result, one of the main issues in the appeal recorded by the appeal inspector was what effect the development would have on the safety and free-flow of traffic in Henfield and on sustainable travel objectives. The inspector allowed the appeal.

56. In dealing with transportation objections he concluded that most Henfield facilities were within reasonable and level walking distance of the appeal site and the roads were also suitable for cycling. Improvements to the footways would make walking easier and safer and a more attractive option. He noted that much attention at the appeal before him focused on the junction of Church Street and High Street. The appeal development would generate additional movements so that there was some potential for additional congestion at peak hours but the transport assessment did not support the high traffic estimates claimed by some objectors which were typically based on car ownership and parking provision rather than car use. Not all cars would be used every day or at the same time of day. Moreover, should excessive queuing occur then alternative routes were available which had wider and higher capacity junctions with the main road. Some drivers were likely to divert to those routes if congestion increased. Those features would themselves serve to keep traffic speeds to safe levels. He rejected the suggestion that the diversion routes were not suitable to carry extra traffic. Accordingly, there was before him a lack of evidence to demonstrate that the Church Street junction would become unsafe or that the congestion or other effects of extra traffic would be severe in terms of the NPPF. He clearly dismissed the arguments of the parish council and individual objectors on highways and sustainability grounds. Neither the district council nor the county highway authority objected to the development on highway grounds (paras 55 and 56 of the decision letter). He concluded that the Barratt development would be a sustainable development and the presumption in favour of such development should be applied.

57. The Sandgate Nursery site was the subject of an application for planning permission in March 2014 for 72 dwellings. Officers recommended approval. ***153** Members rejected that recommendation and refused planning permission on 25 November 2015 including highways grounds. As set out that refusal has been the subject of an appeal.

58. During the course of the appeal a highways statement of common ground was agreed between the appellants and West Sussex County Council, the relevant highways authority. That included agreement that the Sandgate Nursery site was accessible by foot to many of Henfield's facilities and services located about 1.2 kilometres east of the site within a maximum "acceptable" walking distance for pedestrians without mobility impairment of 2 kilometres. The parties agreed that the proposal should not be refused on traffic or transport grounds with the consequence that the highways reason for refusal was withdrawn.

59. The claimants contend that the primary basis for rejecting alternative Option C in the HNP was unsustainable pressure on the local road system which was clearly inconsistent with the inspector's decision in the Barratt appeal. No reference in the plan making process was made to the Barratt appeal decision letter nor to the position of the highways authority in that appeal or in the Sandgate appeals where the highway authority withdrew the highways reason for refusal. The outcome of the Barratt appeal was clearly known both to the parish council and to the defendant. It had been brought to the attention of the independent examiner who was obliged to deal with it.

60. In her first report dated 10 July 2015 the independent examiner in dealing with matters under the hearing ' European Convention on Human Rights and European Union Obligations' expressed "satisfaction that the neighbourhood plan did not breach nor is it in anyway incompatible with the ECHR ". She continued "I am satisfied that a fair and transparent process has been undertaken in the seeking of and the selection of development sites within the neighbourhood plan area. There is a clear rationale to the allocations where presumption is in favour of development within the allocated settlement boundaries close to facilities both to the benefit of future occupants and to continue sustaining those facilities." She continued that it had been determined that an SA/SEA would be required as policies may have significant environmental effects, in particular site allocations. She said:

> "The SA/SEA demonstrates its policies will have no significant social, economic or environmental effects. I am satisfied that the proposals have been significantly assessed and raise no negative impact in either summary (as per Table 3: Summary Assessment of Objectives) nor in the detail of the assessment."

61. In her second report dated 25 February 2016 under the heading "Subsequent changes to policy context since an examination July 2015" the examining inspector said:

> "There had been no subsequent alterations to the European Convention on Human Rights under European Union obligations to impact upon this NDP ... I am satisfied that the neighbourhood plan does not breach nor is in anyway incompatible with the ECHR. ... the SA/SEA demonstrates the revised NDPs policies will have no significant social, economic or environmental effect ... I am therefore satisfied that the neighbourhood plan is compatible with EU obligations and, as modified, will meet the basic conditions in this respect."

62. Section 5 of her report dealt with representations received. In that she said: ***154**

> "Concern is raised about failing to assess housing needs for local and wider community and providing a sufficient allocation of land for housing and unfair exclusion of land on the western side of the village, no objective assessment to support the evidence of 137 unit allocation is correct in terms of numbers, need to provide an opportunity to revisit the other candidate sites to make up the shortfalls. Most of these points were raised on the previous plan. ... the rationale for not supporting development on the western boundary is clearly stated in NDP para 4.19. The rationale for supporting or otherwise is clearly stated in the site allocation paper and there is no reason to reopen these issues with no conflicts arising with meeting the basic conditions."

63. The issue then is whether the inspector was under an obligation to grapple with the implications of the finding of the Barratt appeal inspector on the parish council's assessment of reasonable alternatives and the subsequent development of highways issues in the Sandgate Nursery appeal. Her failure to do so is contended to be in breach of the legal principles established in the *Powergen* and *North Wiltshire* line of cases.

64. I have no hesitation in rejecting the application of the *North Wiltshire* line of cases to the circumstances before the independent examiner and the defendant, namely, that the decision made in the HNP needed to be consistent with the decision on the individual planning decision on the Barratt appeal. *North Wiltshire* was dealing with an entirely different context to a

plan-making exercise in which comparative judgments have to be made within the plan boundary. That exercise is distinct from determining, on an individual basis, whether a planning application is acceptable on a particular site. An individual case is entirely distinguishable from reaching a decision on the spatial dispersal of prospective development in a broader geographical area. That is the case also in *Fox Strategic Land & Property* which, again, was dealing with two planning appeals after the refusal of planning permission. There, the issue was whether the decisions of the Secretary of State were inconsistent with the established spatial vision for the area. In the current context the issue was the establishment of the spatial vision for the HNP and how it is to be realised through objectives in the NDP. It is, in my judgment, a materially different exercise. That does not mean, however, that the Barratt decision may not be a material consideration for the plan making process but there was no obligation on the part of the plan making authority to follow it.

65. Again, none of the *Powergen* line of cases are dealing with plan-making decisions and the comparative exercise which is part of that process. In *Evans* Lord Neuberger reviewed the cases of *Powergen* and *Bradley* amongst others and continued at [66] and [67]:

> 66. Such comparisons with other cases can, however, only be of limited assistance: what is of more importance is to seek to identify the relevant principles. In *Bradley* at [70], Sir John Chadwick did just that and suggested that there were five applicable propositions. At least for present purposes, I would reformulate and encapsulate those propositions in the following two sentences. In order to decide the extent to which a decision-maker is bound by a conclusion reached by an adjudicative tribunal in a related context, regard must be had to the circumstances in which, and the statutory scheme within which, (i) the adjudicative tribunal reached its conclusion, and (ii) the decision-maker is carrying out his function. In particular, the court will have ***155** regard to the nature of the conclusion, the status of the tribunal and the decision-maker, the procedure by which the tribunal and decision-maker each reach their respective conclusions (eg, at the extremes, (i) adversarial, in public, with oral argument and testimony and cross-examination, or (ii) investigatory, in private and purely on the documents, with no submissions), and the role of the tribunal and the decision-maker within the statutory scheme.
>
> 67. Although Sir John expressed his propositions so as to apply to "findings of fact", it seems to me that they must apply just as much to opinions or balancing exercises. The issue is much the same on an appeal or review, namely whether the tribunal was entitled to find a particular fact or to make a particular assessment. Anyway, it is clear from *Powergen* that an assessment as to whether an access onto a highway would be safe fell within the scope of his propositions. Indeed, the ombudsman's decision in *Bradley* itself seems to me to have involved issues as to which she had to make assessments or judgements, such as whether the department concerned should have done more and whether some failures amounted to maladministration – see at para 27 of Sir John's judgment."

66. That makes it clear that a decision-maker can have regard to a balancing exercise carried out by another in a related context but the extent to which he is bound by it requires a consideration of the circumstances and the statutory scheme within which the decision-maker is reaching its conclusion and carrying out its function. Given the different nature of the exercises which an inspector on an appeal under s.78 is concerned and those with which an independent examiner or a plan-making authority is concerned it would be difficult to conclude that the latter were bound by the decision of an inspector on an individual site such as that at West End Lane. But that is not to say that the Barratt decision and the current state of knowledge on the highways network should have been disregarded in the plan making system. The Barratt decision letter was issued on 2 June 2014. The parish council were clearly aware of it, as Mr Osgood, who has filed a witness statement in the current proceedings, attended the Barratt inquiry as a local resident and as a member of the Henfield Parish Council, as also did a Mr P Hill. They were aware also of the comments at the planning workshop on the 7 July 2014.

67. The basis for the claim in the HNP that sites on the western boundary consolidating the recent consent at West End Lane would place unsustainable pressure on the local road system is thus, in my judgment, entirely obscure. Mr Osgood, in his witness statement of 29 July 2016, refers to the planning workshop on 7 July whose purpose was to determine the preferred spatial plan for the parish and, specifically, the approach to be taken to distributing new houses to be allocated by the plan. He says, in paragraph 8 of his witness statement:

> "It was open to the parish council and the examiner to determine where development should go and to rule out development to the west on the basis that the community felt 'it would place unsustainable pressure on the local road system and infrastructure' based upon the following:
>
> > '1. The western side of the village is further from the High Street as a matter of facts;
> >
> > 2. Although some facilities are to the west of the High Street, these are all on the eastern side of the village bar one; ***156**
> >
> > 3. Those travelling from the west would therefore be less likely to travel on foot and more likely to come by car; and
> >
> > 4. Travel by car from the western side of the village is more likely to cause pressure because of pinch points in the road system.'
>
> This was discussed at length at the planning workshop in 7 July 2014 and at the site visits thereafter and the essence of this reasoning appeared in many residents' representations.

68. His following paragraph refers to the statement of common ground submitted at the West End Lane inquiry where agreement was reached that, in highways terms, the roads and junctions local to the site were adequate in terms of safety and capacity to cope with site traffic during the construction period but he goes on to say that local residents were still of the opinion that the increase in traffic would have an adverse effect on highways safety. That was revealed in various consultation responses.

69. The difficulty with the basis upon which Mr Osgood says that the decision was reached that sites on the west would place unsustainable pressure on the local road system and infrastructure is that, firstly, the record of the planning workshop of 7 July says nothing of the sort. Its full terms are set out above. Sites to the east are said to have less of an impact in terms of traffic movement but the difference between east and west was marginal in terms of commuting, shopping and leisure trips. That does not amount to an evidence base for concluding unsustainable pressure on the local road system and infrastructure. Secondly, the other points that Mr Osgood makes in paragraph 8 of his witness statement, as set out above, and that he attributes to other consultation responses do not provide a basis for the conclusion in the HNP either. They are unsupported by any technical or expert evidence which, in so far as it exists, goes the other way. Mr Osgood's views are based on opinion and an opinion that had been rejected in the Barratt appeal. As the claimants submit, the reason given for the rejection of sites on the western boundary was because they would place unsustainable pressure on the local road system. That conclusion and the evidence base for it, was therefore, fundamental to the choice of strategy for the HNP.

70. The question then is whether such evidence as there was, based upon local opinion and, as Mr Osgood says, "what the community felt", was sufficient to meet the standard required under the SEA Directive ? As *Ashdown Forest Economic Development Llp v Secretary of State for Communities and Local Government & Others [2015] EWCA Civ 681* confirmed, "... the identification of reasonable alternatives is a matter of evaluative assessment for the local planning authority, subject to review by the court on normal public law principles [42]."

71. Article 5(2) of Directive 2001/42/EC says:

> "2. The environmental report prepared pursuant to paragraph 1 shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment."

72. Guidance on the implementation of the Directive by the EU advises that: ***157**

> "The essential thing is that likely significant effects of the plan or programme when the alternatives are identified, described and evaluated in a comparable way. ...it is essential that the authority ... responsible for the plan as well as the authorities and public consulted are presented with an accurate picture of what reasonable alternatives there are and why they are not considered the best option."

73. Here, anyone reading the HNP would be of the view that significant development on the western side of Henfield would lead to unsustainable pressure on the local road system. Beyond assertion by local residents who had made the same point at the West End Lane appeal when it had been rejected, there was no evidence to support the view expressed for the rejection of Option C in the HNP. Although the Office of the Deputy Prime Minister's Practical Guide to Strategic Environmental Assessment Directive advises that predictions do not have to be expressed in quantitative terms as quantification is not always practicable and qualitative predictions can be equally valid and appropriate it goes on to say in para.5.B.11:

> "However, qualitative does not mean 'guessed'. Predictions need to be supported by evidence, such as references to any research, discussions or consultation which helped those carrying out the SEA to reach their conclusions."

74. The problem here is that the absolute nature of the rejection of Option C is unsupported by anything other than guesswork. At the very least, having received the Barratt decision letter the plan-making authority, the parish council could have contacted the highways authority to obtain their views on the capacity of the broader local highways network in the western part of Henfield. There is no evidence that that was done. There is no evidence that anything was done when the highways objections to residential development on the Sandgate Nursery site was withdrawn either. Until it is, the outcome of significant development on the western side of Henfield on the local road network is unknown. What is known is that the permitted site and the appealed site together do not provide any insuperable highways objections. Without further highways evidence though, the reason for rejecting Option C as set out in para.4.19 of the HNP is flawed, based as it is upon an inadequate, if that, evidence base. The requirement, under the Directive, that the alternatives are to be assessed in a comparable manner and on an accurate basis was simply not met.

75. The Sandgate Nursery appeal in which the highways reason for refusal was withdrawn would not have been available to the independent examiner in 2015 but it would have been known to the defendant when it received the second report from the independent examiner in February 2016. That combination of factors, namely, the West End Lane appeal decision letter and the highways stance at Sandgate Nursery mean that questions ought to or should have been raised on the part of the defendant on the adequacy of the SEA process for the determination of the spatial strategy in the HNP.

76. Further, the position on Sandgate Nursery was made known to the independent examiner in 2016 through further representations made by the claimants as part of the revised plan process. Given that, and her knowledge of the outcome of the Barratt appeal, her conclusion on compliance of the HNP with EU obligations was wrong. It was insufficient on her part to say that the matter had been raised before ***158*** and refer back to para.4.19 of the HNP. That paragraph, in so far as it deals with the rejection of Option C, I have found was based on what appears to be an erroneous conclusion and certainly had not been reached based upon an accurate appraisal of Alternative C. The obligation under the SEA Directive is to ensure that the consideration of reasonable alternatives is based upon an accurate picture of what reasonable alternatives are. That was not done here. Not only was the conclusion wrong but, in the circumstances, it was irrational, given the absence of an evidence base. Her flawed report then tainted the decision on the part of the defendant.

77. But the defendant knew the position and had the relevant information. It is under an independent duty to set out its decision under reg.19 of the Neighbourhood Planning (General) Regulations 2012 as to why it made the plan. It was clearly unable to make a lawful decision given, as I have found, that the plan breached and was incompatible with EU obligations.

78. It follows that, in my judgment, the assessment of reasonable alternatives within the SEA process was flawed and that the making of the HNP was incompatible with EU obligations. The decision on the part of the defendant to make the plan was thus irrational.

79. This ground succeeds.

Ground 1(b): Lack of any evidential foundation for conclusions

80. I have largely dealt with this under Ground 1(a). I deal with it more shortly as I do also Ground 1(c).

81. It is of note that in the representations made on behalf of the claimants on 16 November 2015 on the HNP it was said in terms that there was no objective assessment to support the contention in the draft neighbourhood plan that locations on the western edge of the village were unsustainable in highways terms. In that representation, not only is there reference to

Appendix 5 – Case Law

c. Mayor of London v Enfield

*694 The Mayor of London v Enfield LBC

No Substantial Judicial Treatment

Court
Court of Appeal (Civil Division)

Judgment Date
18 March 2008

Report Citation
[200] EWCA Civ 202
[2008] Env. L.R. 33

Court of Appeal (Civil Division)

(May , Latham & Moore-Bick, L.JJ.):

March 18, 2008

Directions; Elected mayors; Irrationality; Recycling; Waste management; Waste policy;

H1 *Waste management—judicial review—waste policy—Municipal Waste Management Strategy for London—closure of existing re-use and recycling site—capacity at alternative site—direction by Mayor of London that compensatory provision be made through replacement site—Secretary of State accepting adequate compensatory provision provided—whether maintaining Direction unlawful or irrational—whether able to stand in light of Secretary of State's decision*

H2. The respondent local authority (E) operated two waste re-use and recycling sites as waste disposal authority and subsequently sold one site for development as housing. The remaining site had licensed capacity which could accommodate that previously required at the closed site, with potential for further increase if required. Policy 4A of the relevant London Plan enjoined London boroughs to ensure that land was available to implement the appellant's (M) Waste Management Strategy and M's strategies declared a consistent policy to safeguard or protect all existing waste management sites "unless appropriate compensatory provision is made". M was unaware of the sale, and issued a draft direction designed to delay the closing of the site until a new compensatory provision was found and made operational. E considered this unnecessary on the basis that, combined with increased door-to-door collections, the spare capacity amounted to appropriate compensatory provision as set out in the Municipal Waste Management Strategy for London. M persisted and issued a Direction under s.356(1) of the Greater London Authority Act 1999 which required E to make appropriate compensatory provision by providing a new site within the Borough. Meanwhile, a planning inquiry considered the housing development application, with the main consideration M's objection that the site should retain its planning limitation as use for waste management. M argued that this would be consistent with the aims of the London Plan, which was consistent with and summarised the relevant parts of the Municipal Waste Management Strategy, as well as advice set out in PPS10. The Inspector rejected M's case and recommended the grant of permission for housing. He considered that the remaining capacity, kerbside collections, and other improved waste management services constituted "appropriate compensatory provision" and rejected M's interpretation of that ***695** expression which would require the provision of another site, whatever the current need, to be part of a waste management land bank. The Secretary of State granted permission for housing and agreed with the Inspector's approach on the question of "appropriate compensatory provision". M did not appeal that decision but E sought judicial review of his Direction on the grounds that it was unlawful, irrational and in excess of his powers. The Administrative Court allowed the application, finding that, whilst M's decision had been rationally sustainable at the time it had been given, the Inspector's determination that "appropriate compensatory provision" had been afforded by various policies adopted by and facilities operated by E, once made, had been the only tenable view of the issue. The basis for the M's direction had thereby been undermined and to sustain it in the light of that would be irrational, applying R. v Warwickshire CC Ex p. Powergen Plc .

H3. Mthen appealed to the Court of Appeal on the grounds that the Powergen case had no application as it concerned two public authorities in disagreement on an identical issue. M had his own statutory waste management powers upon which the decision to give the direction depended and those were discrete from the Secretary of State's planning powers, so that he had not been bound by the Secretary of State's view, just as the Secretary of State had not been bound by M's.

H4. **Held,** in dismissing the appeal:

H5. 1. M had not appealed the Inspector's decision, which included the finding that there had been "appropriate compensatory provision" and rejected M's interpretation of that expression. Applying Bradley v Secretary of State for Work and Pensions , it had been open to M, acting rationally, to reject the Inspector's finding, adopted by the Secretary of State. The court's focus was on the decision not to withdraw the Direction, which had been in substance to reject the finding of an adjudicative tribunal; the Inspector. That decision was open to challenge on *Wednesbury* grounds and on the ground that it had been irrational.

H6. 2. The planning decision had been made by the Secretary of State upon the recommendations of the Inspector, not by E, and had been made after a public hearing at which M had been able to advance the very same reasons upon which the Direction had been given. Those reasons had been rejected and that planning decision could not be questioned in any legal proceedings by M as he had not appealed. Although in theory M might have reached a different conclusion for waste management strategy purposes, the relevant terms of the Municipal Waste Management Strategy and the London Plan were materially the same and were required by statute to be mutually consistent. The Secretary of State's decision had been reached after due process in a properly constituted statutory adjudication which addressed the very same question and concluded that M had been wrong. No tenable reasons, unconsidered by the Inspector, had been given by M to justify a different conclusion. Although M's original decision to give the Direction could be seen as tenable at the time it had been made, to persist in it became untenable once its underlying justification had been subjected to independent adjudicative scrutiny in the statutory planning process.

**696*

H7 Legislation referred to:

Highways Act 1980 s.278 .
Town and Country Planning Act 1990 ss.70(2), 77, 284 and 288 .
Greater London Authority Act 1999 ss.41 and 356 .
Planning and Compulsory Purchase Act 2004 s.38(2) .

H8 Cases referred to:

R. (on the application of Bradley) v Secretary of State for Work and Pensions [2008] EWCA Civ 36; The Times, February 25, 2008
R. v Secretary of State for the Home Department Ex p. Danaei [1998] Imm. A.R. 84
R. v Warwickshire CC Ex p. Powergen Plc (1998) 75 P. & C.R. 89; [1997] 3 P.L.R. 62; [1998] J.P.L. 131

H9 Representation

Mr G. Stephenson , instructed by Greater London Authority, appeared on behalf of the appellant.
Mr M. Lowe Q.C. and Mr R. Clarke , instructed by the Borough Solicitor, appeared on behalf of the respondent.

JUDGMENT

MAY L.J.:

Introduction:

1. What happens when two competent public authorities each reach, act upon and persist in maintaining inconsistent decisions on the same matter? There can be no all-embracing abstract answer to that question, since it might arise in a variety of circumstances. But, as Sir Paul Kennedy wrote, when he gave the Mayor of London permission to appeal against Mitting J.'s order in this case in the Administrative Court of July 11, 2007, the maintenance of two apparently inconsistent decisions cannot be acceptable.

2. Mitting J.'s judgment is at [2007] EWHC 1795 (Admin). It may be referred to for a more detailed account of the facts and issues than I shall need to give in this judgment.

Facts

3. The proper management of waste is a contemporary imperative.

4. Until October 2005, Enfield LBC had, and operated, two Reuse and Recycling Centres, at Carterhatch Lane and Barrowell Green. Barrowell Green was the larger site, having a licensed capacity well able to accommodate alone, with a substantial margin, the volume of waste in fact delivered to the two sites.

5. In February 2005, Enfield sold their Carterhatch Lane site to Fairview Estates, who applied for and were granted planning permission to build houses there. Meanwhile, on March 16, 2005, the Mayor, who did not then know about the sale of the Carterhatch Lane site to Fairview Estates, issued the first of two ***697** draft directions designed to delay the closing of this site until Enfield had found a compensating new site and made it operational. Enfield regarded this as quite unnecessary, because Barrowell Green alone was entirely sufficient and because they were making other arrangements which would reduce the delivery of waste to sites such as these. However, the Mayor persisted and, on March 7, 2006, issued a direction under s.356 of the Greater London Authority Act 1999 directing Enfield to make "appropriate compensatory provision" for the closure of the Carterhatch Lane site by providing a new site within the London Borough of Enfield.

6. Meanwhile there was a planning inquiry to determine Fairview Estates' application for planning permission for the Carterhatch Lane site. A planning inspector held a public inquiry, whose main subject of contention was the Mayor's objection that the site should retain its planning limitation as use for waste management. The Mayor's thinking, no doubt, was that, if Fairview Estates, now the owners of the site, were prevented from using it for housing, the site would have to revert to its permitted use for waste management.

7. The contest before the planning inspector raised under the London Plan and for planning purposes the very same question which the Mayor had addressed when he issued his direction under his Municipal Waste Management Strategy for waste management purposes. This is not surprising, because the Mayor has a duty under s.41 of the 1999 Act to have strategies which are consistent with each other; because the London Plan and the Municipal Waste Management Strategy are two such strategies; because the Policy 4A of the relevant London Plan enjoins London boroughs to ensure that land is available to implement the Mayor's Waste Management Strategy; and because each of these strategies declares a consistent policy to safeguard or protect all existing waste management sites "unless appropriate compensatory provision is made".

8. The Mayor had and took full opportunity to deploy before the planning inspector his case that planning permission should be refused. This was the same case as had supported his direction of March 7, 2006. The inspector decided to recommend that planning permission for housing should be granted, and, in so recommending, rejected the Mayor's case and gave full reasons for doing so.

9. The heart of the inspector's decision, dated April 21, 2006, was that the Barrowell Green site had sufficient capacity to absorb the waste which would have gone to Carterhatch Lane; and that Enfield's improved waste management services, including "bring sites", kerbside collections and home composting, would reduce the need for visits by the public to a site to dispose of waste for recycling. This constituted "appropriate compensatory provision". The inspector rejected the Mayor's interpretation of this expression as requiring the provision of another site, whatever the current need, to be part of a waste management land bank.

10. On July 5, 2006, the Secretary of State granted planning permission for residential development adopting and confirming the conclusions of the inspector's report. She noted that the main parties disagreed about what "appropriate compensatory provision" might entail. She agreed with the inspector that, although the provision of a replacement site might be appropriate in certain ***698*** cases, the evidence of capacity at Barrowell Green and Enfield's progress in waste management were all material considerations in assessing appropriate compensation, and these demonstrated that appropriate compensatory provisions had been made. Closing the Carterhatch Lane site was a clear loss for local residents, which was most unfortunate, but a decision had to be made as to the future of the site. The proposed development accorded with relevant housing policies and would deliver affordable housing in an area of housing need. The Secretary of State's overall conclusion was that the planning application accorded with the development plan and national policies on housing *and waste management* . I would add that closing the Carterhatch Lane site without providing another site also accorded in this case with the Mayor's Municipal Waste Management Strategy upon the inspector's interpretation and application of the critical requirement in it of "appropriate compensatory provision".

11. The Mayor did not seek to challenge the Secretary of State's decision by appeal. Mr Stephenson, who appeared for the Mayor before us and Mitting J., accepted that the Mayor had the opportunity to do so under s.288 of the Town and Country Planning Act 1990 .

The Judicial Review proceedings

12. The Mayor's direction to Enfield was given on March 7, 2006. The inspector's report was dated April 21, 2006, following a public hearing between March 14 and 16, 2006. On May 23, 2006 Enfield started these judicial review proceedings, in which they challenged the Mayor's direction of March 7, 2006 on the grounds that it was unlawful, irrational and in excess of his powers. The grounds for their challenge included those which succeeded before the inspector and which the Secretary of State subsequently upheld.

13. On July 24, 2006, following the Secretary of State's decision of the planning application, Enfield wrote to the Mayor saying that, in the light of the conclusions of the inspector and the Secretary of State, the decision to serve the direction could not stand. The Mayor was invited to withdraw the direction to save further costs of the judicial review application. Following a chasing letter from Enfield of October 6, 2006, the Mayor declined to do so by letter dated October 16, 2006.

14. This brief letter made two points only. First, it was said that the Secretary of State had reached a decision on the balance of the planning merits without taking account of the Municipal Waste Management Strategy. The Secretary of State had concentrated on the waste management strategy in the development plan which did not include the Municipal Waste Management Strategy. This in substance was incorrect because, although of course the Secretary of State made the

planning decision with reference to planning policies and merits, the development plan did at Policy 4A expressly direct boroughs to ensure that land is available to implement the Municipal Waste Management Strategy. The spatial policy for waste management in the development plan was expressly in support of the Mayor's Municipal Waste Management Strategy in terms which relevantly were the same as the corresponding terms of that strategy. The inspector and the Secretary of State had both made decisions which concentrated on "appropriate *699 compensatory provision", which was the very basis of the Mayor's direction. Further, the inspector and the Secretary of State were obliged by s.70(2) of the Town and Country Planning Act 1990 to have regard to the provisions of the development plan. By s.38(2) of the Planning and Compulsory Purchase Act 2004 , the relevant development plan for Greater London was the spatial development strategy with which the Mayor's Municipal Waste Management Strategy was required to be consistent. By s.38(6) of the 2004 Act, the planning determination had to be made in accordance with the development plan unless material considerations indicated otherwise. There were no relevant such material considerations. So the inspector and the Secretary of State would have to decide the critical issue in favour of the Mayor, if in their judgment the Mayor's view of the application of his Waste Management Strategy were correct.

15. The second reason given in the letter of October 16, 2006 was that the Mayor's direction did not become perverse simply because the Secretary of State reached the planning decision that she did. This, so far as it goes, may be correct. But, for reasons which I shall explain, it would in my view be necessary for the Mayor to advance additional persuasive reasons, which were not advanced before the inspector, to be able legitimately to maintain the direction in the face of the planning decision of the inspector and the Secretary of State.

16. On July 31, 2007, Enfield applied to amend their grounds for judicial review to include a challenge based on the Mayor's refusal in his letter of October 16, 2006 to reconsider his decision to give the direction in the light of the Secretary of State's decision on the planning application. It was said to be both irrational and an abuse of power for the Mayor to persist in the direction. Mitting J. gave permission to make this amendment at the hearing of the judicial review application. The Mayor did not seek to appeal this decision, nor did he ask for an adjournment to be able to deal with it by adducing further evidence or for other reasons.

17. There were thus before Mitting J. two challenges, the first to the giving of the direction of 7th March 2006, and the second to the refusal to withdraw it in the letter of October 16, 2006. Mitting J. upheld the legitimate rationality of the original direction. But he acceded to Enfield's second ground of challenge and ordered the Mayor's direction of March 7, 2006 to be withdrawn. He concluded, at [27] of his judgment, that the basis for the Mayor's direction had now been undermined by the decision and reasoning of an inspector and Secretary of State on the planning application. To sustain the direction would now be irrational.

The procedural ground of appeal

18. The Mayor's second ground of appeal to this court is that the judge's decision was or should have been limited to the challenge to the Mayor's original direction and that Mitting J. had no jurisdiction to consider whether the Mayor was wrong to refuse to withdraw what started off as a legitimate direction. Mr Stephenson persisted, notwithstanding the plain terms of the permitted amendment, in a submission *700 that the refusal to withdraw was not before the court. It plainly was. He himself had accepted in discussion with the judge that the refusal to withdraw could be challenged in the proceedings (p.28B of the transcript for July 11, 2007). Mr Stephenson persisted in a submission that the judge had not decided this second ground of challenge, when he plainly had so decided—see [27] of the judgment and the terms of the resulting order. Mr Stephenson persisted in a submission that the judge cannot properly have decided the second issue without specific reference to the letter of October16, 2006 and its contents. Yet its contents were, as Mr Stephenson himself accepted, exiguous and the judge in substance dealt with the only substantial point which the letter raised, that is that the inspector had not considered waste management strategy. I would summarily reject the second ground of appeal, and I am rather surprised that it was raised and persisted in. If this stemmed from regret that further material was not before the court, no attempt has been made to get it before the court.

The judge's decision

19. The judge decided that the Mayor's direction of March 7, 2006 was rationally sustainable at the time it was given. The primary decision maker was the Mayor, whose officers had considered in detail the kernel of Enfield's proposals. They advised the Mayor, for reasons which the judge had briefly summarised at [8] of his judgment, that Enfield's proposals did not meet the requirements of the strategy. It was necessary in their view to give the direction about the provision of an additional site. The decision to do this was at the time one which the Mayor was entitled to take, there being room for disagreement about what steps should be taken to replace the facilities provided by the closed site. The judgment was not unreasonable at the time it was made, and was one for the Mayor to take, not the court.

20. However, the inspector's decision and the Secretary of State's acceptance of it put things in a different light. The judge concluded, with reference to *R. v Warwickshire CC Ex p. Powergen plc [1997] 3 P.L.R. 62; [1998] 75 P. & C.R. 89* , that the only properly tenable view after the publication of the planning decision was that which the planning decision espoused. The basis of the Mayor's direction had been undermined. To sustain it would now be irrational.

Grounds of appeal

21. The Mayor's grounds of appeal against this decision are that Powergen is distinguishable and its ratio had no present application; that the Mayor has his own statutory waste management powers upon which the decision to give the direction depended and these are discrete from the Secretary of State's planning powers; and that the Mayor is not bound by the Secretary of State's view. As to Powergen , the scheme of the relevant legislation was materially different. In Powergen , the two disagreeing authorities were addressing an identical issue and it was held to be contrary to public policy for a public authority involved in the issue to veto or frustrate an outcome disliked. In this case, the Secretary of State was concerned with planning issues, but the Mayor with waste ***701*** management issues. The Secretary of State was concerned with safeguarding on planning grounds a particular site which had been closed and sold to a developer. The Mayor was concerned with providing another waste management site irrespective of the outcome of the planning inquiry. The Mayor's waste management strategy is much more broadly based upon a need to maintain or increase available waste management sites to encourage recycling and reuse. The Secretary of State was not bound by the Mayor's antecedent decision. So why should the Mayor be bound by the Secretary of State's later decision?

Discussion and decision

22. In Powergen , the Secretary of State, by his inspector, allowed an appeal and granted planning permission for a supermarket on condition that Powergen did not use the site until highway works were completed. The condition required Powergen to enter into an agreement with Warwickshire CC as highway authority under s.278 of the Highways Act 1980 . The county council refused to enter into the s.278 agreement on the ground that the highway works were not in the public interest, this being the same objection that had been advanced before and rejected by the planning inspector, and against which the county council had not appealed. This court upheld a decision at first instance that, following a successful appeal by the developer, the highway authority had no option but to co-operate in implementing the planning permission by entering into the s.278 agreement. It was perverse to do otherwise. It was not reasonable for the highway authority, whose road safety objections had been fully heard and rejected on the planning appeal, to maintain their original view quite inconsistently with the inspector's independent factual judgment. The highway authority would have to raise a fresh objection, sufficiently different from their earlier one, to have a realistic prospect of saying that their view might have prevailed and should now prevail. Simon Brown LJ, giving the only substantive judgment noted the apparent strength of the highway authority's argument that s.278 of the 1980 Act required the authority itself to be satisfied that the proposed road works would benefit the public, and that there was no statutory provision enabling the Secretary of State to direct the authority to be satisfied or otherwise require it to enter into an agreement with the developer. But he agreed that Forbes J., the first instance judge, came to the right answer. This had included that the highway authority's remaining discretion was somewhat limited; and that the proper exercise of that discretion would not embrace a further and separate reconsideration of the benefit to the public of

the highway works solely by reference to the same reasons as those which had already been considered and determined in the planning process.

23. Since Mitting J.'s decision in the present case, this court has decided *Bradley v Secretary of State for Work and Pensions [2008] EWCA Civ 36* . The Parliamentary Ombudsman had found, in favour of workers who had lost all or part of their final salary pensions when their occupational pension schemes were wound up, that there had been maladministration. The Secretary of State rejected all but one of the ombudsman's findings. This court held, with reference to the Parliamentary Commissioner Act 1967 , ***702** that the Secretary of State, acting rationally, was entitled to reject a finding of maladministration and prefer his own view. However, it was necessary that his own view was itself not irrational. It was not enough for the Secretary of State simply to assert that he had a choice. He must have a reason for rejecting a finding which the ombudsman had made after an investigation under the powers conferred by the 1967 Act. In the light of Powergen and R. v Secretary of State for the Home Department Ex p. Danaei (1998) IM MAR 84 , the Secretary of State was not entitled to reject the ombudsman's finding merely because he preferred another view which could not be characterised as irrational.

24. In Bradley , Sir John Chadwick gave the leading judgment with which Blackburne J. and Wall L.J. both agreed. Sir John Chadwick referred to Powergen and Danaei , and quoted Simon Brown L.J.'s categoric conclusion in Powergen that it was not there reasonable for the highway authority to maintain its own original view. Sir John Chadwick then said at [65] of his judgment:

> "Lord Justice Simon Brown emphasised (ibid, 624d–625b) that he had reached that conclusion not by reference to any general question regarding the proper legal relationship between planning authorities and highway authorities upon road safety issues but in the light of three basic considerations: (i) that the site access and associated highway works, together with the road safety problems which they raised, had been (a) central to the particular planning application, and (b) considered in full detail rather than left to be dealt with as reserved matters; (ii) that the planning permission had been granted following appeal to the Secretary of State and not merely by the local planning authority itself; and (iii) that there were no new facts or changed circumstances following the inspector's determination of the appeal — the highway authority's continued refusal was based upon the identical considerations that their witness had relied upon in seeking to sustain the planning objection before the Inspector."

He concluded (*ibid* , 626a):

> "... the Inspector's conclusion that that issue, because of its independence and because of the process by which it is arrived at, necessarily becomes the only properly tenable view on the issue of road safety and thus is determinative of the public benefit."

25. Sir John Chadwick said at [66] that the basis upon which this court dismissed the appeal in the Powergen case was that —given the circumstances in which, and the statutory framework within which, the inspector's conclusion on the issue of road safety had been reached—it was irrational for the county council to continue to adhere to its own view on that issue. The inspector's view had become "the only properly tenable view" on the issue of road safety.

26. Having considered Danaei , Sir John Chadwick then said at [70] and [71]:

> "For my part, I think that the following principles can be derived from the judgments in Powergen and Danaei : (i) the decision maker whose decision is under challenge (in the former case, the local highway authority; in the latter, the Secretary of State) is entitled to exercise his own discretion as **703* to whether he should regard himself as bound by a finding of fact made by an adjudicative tribunal (in the former case, the planning inspector; in the latter, the special adjudicator) in a related context; (ii) a decision to reject a finding of fact made by an adjudicative tribunal in a related context can be challenged on *Wednesbury* grounds; (iii) in particular, the challenge can be advanced on the basis that the decision to reject the finding of fact was irrational; (iv) in determining whether the decision to reject the finding of fact was irrational the court will have regard to the circumstances in which, and the statutory scheme within which, the finding of fact was made by the adjudicative tribunal; (v) in particular, the court will have regard to the nature of the fact found (e.g. that the immigrant was an adulterer), the basis on which the finding was made (e.g. an oral testimony tested by cross-examination, or purely on the documents), the form of the proceedings before the tribunal (e.g. adversarial and in public, or investigative with no opportunity for cross-examination), and the role of the tribunal within the statutory scheme.
>
> Properly understood, as it seems to me, the two cases provide no support for the proposition that, as a matter of law, it is not open to a body which has been the subject of a finding of maladministration by the Parliamentary Ombudsman to reject that finding; rather the cases are authority for the proposition that it is open to such a body, acting rationally, to reject a finding of maladministration. The cases provide helpful illustrations of circumstances where, in other contexts, it was not rational for the decision maker to reject findings of fact made by adjudicative tribunals on the basis of a contrary (albeit rational) view which the decision maker preferred. ... It is not, I think, a general rule that facts found in the course of a statutory investigation can only be impugned on *Wednesbury* grounds: although, plainly, if the investigator can be shown to have acted irrationally, that will be a powerful reason for rejecting his findings. The true rule, as it seems to me, is that the party seeking to reject the findings must himself avoid irrationality: the focus of the court must be on his decision to reject, rather than on the decision of the fact finder."

27. It is notable that this passage refers to a finding of fact. In the present case, the inspector's finding that there was "appropriate compensatory provision" was in part a finding of fact. But it also embraced a rejection, on the facts and circumstances of this case, of the Mayor's contention that "appropriate compensatory provision" had for him a meaning which requires that land used for recycling should be retained or replaced as such, even though, without retention or replacement, the capacity of the other Enfield site was amply large enough for present or anticipated future needs. As I have said, the Mayor could have appealed the inspector's decision as adopted by the Secretary of State, but did not do so.

28. The Mayor, through Mr Stephenson, does not seek to challenge the validity of the planning decision in this court, and could not properly do so in the face of s.284 of the 1990 Act. This provides that the validity of a decision on an application for planning permission referred to the Secretary of State under s.77 (as **704* this application was) shall not be questioned in any legal proceedings whatsoever except as provided by Pt XII of the 1990 Act. That could have included an appeal under s.288 , but there was no such appeal.

29. Applying Sir John Chadwick's analysis of Powergen and Danaei , it was open to the Mayor, acting rationally, to reject the inspector's finding adopted by the Secretary of State. The court's focus in this case must be on the decision not to withdraw

the direction of March 7, 2006. This decision was in substance to reject the finding of an adjudicative tribunal, the planning inspector. It is open to challenge on *Wednesbury* grounds and on the ground that it is irrational. The court has regard to the statutory scheme of the planning inquiry, which included that the decision was made by the Secretary of State upon the recommendations of the inspector, not by the local planning authority. The court notes that the inspector's decision was made after a public hearing at which oral evidence was given and tested; and notes in particular that the Mayor had the opportunity to advance, and did in fact advance in full, the very same reasons upon which the direction was given, and that these reasons were rejected. As I have said, the Mayor did not appeal this decision and cannot therefore question it in any legal proceedings whatsoever. It is not, I think, necessary for the court to dissect the planning decision into its factual part and its legal construction part. Although in theory the Mayor might have reached a different conclusion for waste management strategy purposes, the relevant terms of the Municipal Waste Management Strategy and the London Plan were materially the same and were required by statute to be mutually consistent. Further, as I have indicated, although the Mayor might have had additional reasons of substance, not advanced in the planning appeal, for reaching a different conclusion, the letter of October 16, 2006 did not in fact advance any such tenable additional reasons. The answer to Mr Stephenson's rhetorical question: why should the Mayor be bound by the Secretary of State's later decision? is in short that the Secretary of State's decision, which the Mayor did not appeal, was reached after due process in a properly constituted statutory adjudication which addressed the very same question and concluded that the Mayor was wrong; and there is no additional reason unconsidered by the inspector to justify a different conclusion. Although, as the judge held, the Mayor's original decision to give the direction could be seen as tenable at the time it was made, to persist in it become untenable once its underlying justification had been subjected to independent adjudicative scrutiny in the statutory planning process. For these reasons, the Mayor's decision not to withdraw the direction must be regarded as irrational.

30. I would dismiss the appeal.

LATHAM L.J.:

31. I agree.

MOORE-BICK L.J.:

32. I also agree.

***705**

Appendix 5 – Case Law

d. R (Warwickshire) v Powergen

event, but I am satisfied that with the active co-operation of the council the process could have been undertaken more efficiently and have been brought to a conclusion prior to the commencement of the inquiry, with at least some consequent saving in time and expenditure.

In my judgment it cannot be said that the Inspector was *Wednesbury* unreasonable in reaching the conclusion he did albeit it appears to the parties before me that the costs involved are very small, relating as I have said, to a few letters.

As to the second ground of challenge I do not accept the argument that the costs order to pay "the unnecessary additional costs incurred in concluding the section 106 obligation" (paragraph 17) provides the taxing master with insufficient material upon which to decide what costs he should allow. His attention can be drawn to section 106 and to circular 16/91. He will be able to have available the costs decision letter and, if it helps him, the planning decision letter. He will have to make a judgment as taxing masters invariably have to do in situations much more complex than the present. I would merely add that no evidence has been presented to me from, for example, a costs draughtsman to suggest that the Inspector's order presents the taxing master with an impossible task.

The challenge to the second part of the costs order is therefore also rejected. Had I concluded in favour of Wakefield on this aspect of the case I would in the exercise of my discretion, for reasons which I hope are apparent from what I have said already, have refused any relief.

This application for judicial review of the costs order is therefore dismissed. The applicant will pay the respondent's costs.

Application dismissed with costs.

Solicitors—Sharpe Pritchard, London; Treasury Solicitor.

Reporter—Megan Thomas.

R. v. WARWICKSHIRE COUNTY COUNCIL EX PARTE POWERGEN PLC

COURT OF APPEAL (Simon Brown, Otton and Mummery L.JJ.): July 31, 1997

Town and country planning—Refusal of outline planning permission for development as detrimental to interests of highway safety—Inspector upheld appeal subject to proposed highway works being carried out—Highway authority then refused to enter into agreement under section 278 Highways Act 1980 to carry out necessary works—Whether refusal lawful

In 1994, the respondent, P, applied for outline planning permission for a supermarket. The proposed access and necessary highway works were fully detailed and were not reserved matters. Warwick District Council refused permission. One of the reasons given was that, having consulted the appellant county council as the local highway authority with regard to the proposed highway works, as required by article 18 of the Town and Country Planning (General Development) Order 1988, the proposal was considered to be detrimental to the interests of highway safety. On appeal under section 78 of the Town and Country Planning Act 1990, the Inspector concluded that the proposals for access to the site were adequate. He allowed the appeal and granted outline permission subject, *inter alia*, to the proposed highway works being carried out. P then sought to enter into an agreement under section 278 of the Highways Act 1980 with the appellant council whereby the council, as highway authority, would carry out the necessary works. The appellant refused to enter into an agreement for the same reasons as the district council had originally refused planning permission. An application for judicial review of the highway authority's refusal to enter into a section 278 agreement was upheld by Forbes J. on the basis that section 278 must be interpreted in the context of the planning process. To allow a highway authority to reconsider the benefit to the public of the highway works when such works had already been considered and determined in the planning process would largely frustrate the scheme of the legislation of which section 278 was a part. On appeal to the Court of Appeal:

Held, dismissing the appeal, that, following a successful appeal by the developer the relevant highway authority has no option but to co-operate in implementing the planning permission by entering into a section 278 agreement. Apart from the argument based on the role of section 278 within the scheme of the legislation, it was unreasonable in the *Wednesbury* sense for a highway authority, whose road safety objections have been fully heard and rejected on appeal, then, quite inconsistently with the Inspector's independent factual judgment on the issue, nevertheless to maintain its original view.

Cases referred to:

(1) *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997; [1968] 2 W.L.R. 924; [1968] 1 All E.R. 694; 112 S.J. 171, HL.

(2) *R. v. Secretary of State for the Home Department ex parte Onibiyo* [1996] 2 W.L.R. 490; [1996] 2 All E.R. 901; [1996] Imm.A.R. 370, CA.

Legislation construed:

Section 278 Highways Act 1980, the material parts of which are set out in the judgment of Simon Brown L.J.

Appeal by Warwickshire County Council as highway authority from a decision of Forbes J. given in the Divisional Court of Queen's Bench on January 9, 1997 by which he allowed an application for judicial review by

Powergen Plc and held that the Council's refusal to enter into an agreement under section 278 of the Highways Act 1980, after a successful appeal against a refusal of planning permission was unlawful. The facts are stated in the judgment of Simon Brown L.J.

Michael Supperstone, Q.C. for the appellant.
William Hicks, Q.C. for the respondent.

SIMON BROWN L.J. Highway authorities are the bodies primarily charged with the responsibility of ensuring that our roads are reasonably safe: safely designed, safely regulated and safely maintained. Ample powers are given to them for this purpose, both under the Highways Act 1980 and the Road Traffic Regulations Act 1984.

Section 278 of the Highways Act 1980, one of a group of sections in part XIII under the heading "Financial Provisions", allows highway authorities to enter into agreements with developers for the execution of highway works at the developer's expense. In its present form (substituted by section 23 of the New Roads and Street Works Act 1991 for the section originally enacted) it states, so far as material:

> Agreements as to execution of works.
> 278 (1) A highway authority may, if they are satisfied it will be of benefit to the public, enter into an agreement with any person—
> (a) for the execution by the authority of any works which the authority are or may be authorised to execute, or
> (b) for the execution by the authority of such works incorporating particular modifications, additions or features, or at a particular time or in a particular manner,
> on terms that that person pays the whole or such part of the cost of the works as may be specified in or determined in accordance with the agreement.

There can be no doubt that ordinarily speaking a highway authority will not be "satisfied it would be of benefit to the public" to enter into a section 278 agreement unless it is satisfied, *inter alia* about the road safety implications of the proposed scheme. And until it is thus satisfied, it has no discretion to enter into an agreement. What, however, is the position when the highway authority has objected to the grant of planning permission for a particular development on road safety grounds and then, on appeal to the Secretary of State, that objection has been fully heard and resolved in the developer's favour with the grant of a conditional planning permission? Is the highway authority then still entitled (perhaps even bound, assuming it remains of its original view) to maintain its objection and to refuse to enter into a section 278 agreement, even though such refusal will prevent the developer from satisfying the condition and implementing his permission?

That is the crucial issue now before us. It is formulated by Mr Supperstone, Q.C. for the appellant highway authority thus: What is the proper legal relationship between the role of a planning authority in determining whether or not to grant planning permission, and, if so, subject to what conditions if any, and the role of a highway authority in determining whether or not to enter into a section 278 agreement? It is, he submits, a question of fundamental importance to all planning authorities and highway authorities throughout the country.

With that brief introduction let me turn now to the facts of the case which I shall set out altogether more shortly than did the judge below.

In June and September 1994 Powergen applied to Warwick District Council (the District Council) for outline planning permission for the development of Powergen's site at the former Avon Power Station in Emscote Road, Warwick. The proposed development was for a supermarket, associated car parking for 500 cars, petrol filling station and suitable means of access to the site from Emscote Road. The proposed access and highway works were fully detailed and illustrated on drawings which accompanied the applications; they were not reserved matters. In summary they comprised the following main elements:

(i) widening the highway and a bridge across the Grand Union Canal to provide a site access junction;
(ii) installing a full traffic signal control junction;
(iii) providing a right hand turning lane and pedestrian crossings.

As part of its consideration of the planning applications the District Council, in compliance with article 18 of the Town and Country Planning (General Development) Order 1988, was required to consult with the appellant county council as the local highway authority with regard to the proposed highway works. Having done so, on November 1, 1994, the District Council refused the September 1994 application. (It failed to determine the June 1994 application within the prescribed time limit. Nothing, however, turns on this: it was a duplicate application and its non-determination gave rise to an identical right of appeal. It is accordingly convenient to treat there as having been but a single application.) The first of the four reasons given for refusing planning permission was this:

> The District Planning Authority, in consultation with the County Highway Authority, considers that the proposed traffic signal junction would provide insufficient forward visibility over the Canal bridge and therefore stopping sight distance requirements are not met through the proposed junction. The proposal would therefore be detrimental to the interests of highway safety on this busy section of the A445.

Powergen duly appealed under section 78 of the Town and County Planning Act 1990 whereupon the Secretary of State appointed an Inspector to hold a local inquiry and to determine the appeal on his behalf.

In describing the development proposal in his decision letter of January 11, 1995 the Inspector noted that:

> Although the appeals relate to applications for outline planning permission the details of the proposed access to the site are not a reserved matter and I have accordingly taken account of them.

As to whether planning permission should be granted he said:

> I consider the outcome of the appeals . . . turns on whether the proposals for access to the site are satisfactory.

Amongst the witnesses called by the District Council at the three day public inquiry was Mr Winch, one of the appellant's senior highway contract engineers. He gave detailed evidence about the road safety issue and fully explained the county council's reasons for concluding that the proposed access and highway works were unsatisfactory in road safety terms. Opposing expert evidence was given on behalf of Powergen. Having

reviewed all this evidence and the rival submissions at some length in his decision letter the Inspector then reached the following main conclusions:

> The question is then whether the proposed signal-control junction offers in this case an adequate degree of traffic safety. (paragraph 27)
>
> In all the circumstances I am not persuaded that the proposed signal-control junction would present such a threat to road safety as to justify dismissing the appeals. (paragraph 28)
>
> In sum, I accept on the traffic issue that adequate provision would be made for vehicular and pedestrian movement in relation to the benefits to be derived from the reclamation of the site. (paragraph 29)

The Inspector accordingly allowed the appeals and granted outline planning permission subject to a number of conditions of which one only is presently relevant.

> 8. The development hereby permitted shall not come into use before the bridge across the Grand Union Canal shall have been widened sufficiently to enable access to the site to be provided with a traffic signal installation in accordance with [a particular drawing] the adjustment of carriageway levels on the bridge approaches and the provision of pedestrian guard railings.

To satisfy condition eight Powergen obviously need the appellants to carry out the specified highway works which, for practical purposes, requires also that they now enter into a section 278 agreement. By letter dated February 3, 1995 such an agreement was sought. It was refused. On June 15, 1995 the relevant committee of the county council resolved that it "still" considered the proposed access arrangements to be unsafe. (The county council has accepted throughout that its refusal is based on the self-same objections as underlay the District Council's original refusal of planning permission and which Powergen then succeeded in overcoming on the planning appeal.) Powergen then sought to resolve the matter by negotiation and in the event put forward two further schemes. On August 24, 1995, however, these in turn were rejected.

Hence this judicial review application, a challenge to the highways authority's refusal to enter into a section 278 agreement with Powergen such as will enable them to implement the planning permission granted on appeal. That challenge succeeded before Forbes J. on January 9, 1997. The highway authority now appeal to this court.

The essence of Forbes J.'s judgment is, I think, to be found in this passage:

> It is common ground that the new section 278 was intended to fit into and play its part in the overall legislative system for the controlled development of land through the planning process and I accept that section 278 must be interpreted accordingly. In my opinion, where the benefit to the public of the proposed highway works, in respect of which an agreement with the Highway Authority is sought under section 278 of the 1980 Act, has been fully considered and determined in the planning process, because the highway works in question form a detailed and related aspect of the application for development of land in respect of which planning consent has been properly obtained through that planning process, then the Highway Authority's discretion whether to enter into the section 278 agreement will necessarily be somewhat limited. In such a case, the matters remaining to be considered by the Highway Authority in the proper exercise of its discretion under section 278, are likely to be relatively minor in nature. I agree with Mr Hicks that the proper exercise of that discretion by the Highway Authority will not embrace a further and separate reconsideration of the benefit to the public of the highway works in question by reference to the same reasons as those which had already been considered and determined in the planning process. If such a reconsideration by the Highway Authority were to be a proper exercise of its discretion under section 278, then that would largely frustrate the scheme of the legislation of which section 278 is conceded to be part. This would be particularly so where, as in the present case, there has been no challenge to the validity of the relevant planning decision pursuant to section 288 of the Town and Country Planning Act 1990, notwithstanding the Highway Authority's right to bring such a challenge under that section.

This last sentence refers to the fact that even though the highway authority here were not separately represented as an objector on Powergen's appeal, they were clearly a "person aggrieved" and thus entitled, were the decision unreasonable or otherwise erroneous in point of law, to challenge it by way of statutory application under section 288. Without such a challenge, section 284 provides that the decision on the section 78 appeal "shall not be questioned in any legal proceedings whatsoever".

It is the appellant's case, however, that they neither need nor seek to question this grant of planning permission. It is, they contend, one thing to grant such a permission, quite another to suggest that it operates as an implied direction to the county council then to enter into a section 278 agreement to enable it to be implemented. The planning permission, submits Mr Supperstone, implies only that no valid planning grounds exist for refusing permission. The question thereafter arising for the highway authority is, he maintains, a different one. They must still ask: is this development to be regarded as a benefit to the public? That involves the county council exercising what throughout his argument Mr Supperstone repeatedly called "an independent discretion" whether or not to enter into the proposed section 278 agreement.

The strength of Mr Supperstone's argument appears to lie in this: that on its face section 278 requires the highway authority itself to be satisfied that the proposed roadworks would be of benefit to the public, there being no provision under the legislation for the Secretary of State or anyone else to direct that it be thus satisfied or otherwise to require it to exercise its discretion to enter into an agreement with the developer. Its weakness, however, is that it would leave the highway authority able to override the planning process withstanding (a) that road safety considerations are clearly material to the determination of planning applications—see for example paragraphs 2.11 and 6.1 of PPG 13, and, indeed, article 18 of the General Development Order; and (b) that whereas there is ample scope on a section 78 appeal for the Secretary of State to hear and determine a factual dispute between the developer and the highway authority on road safety issues, no such possibility arises if the highway authority refuses to enter into a section 278 agreement.

It was essentially because Forbes J. found it unacceptable that the housing authority should be able to defeat the planning process in this way that, in the passage already cited from his judgment, he held that where, as here, a conditional planning permission is granted on appeal, "the highway

authority's discretion whether to enter into the section 278 agreement will necessarily be somewhat limited". He then turned at the end of his judgment to consider Powergen's challenge in *Wednesbury* terms:

> In this case there had been a dispute as to the balance of the public interest with regard to the proposed development. The adequacy of the access arrangements and the related highway works was one factor in that balance. In the course of the planning process, the County Council as Highway Authority argued that, because of the lack of forward visibility, the balance of public interest was against the proposed development for road safety reasons. The dispute was fully argued at the planning appeal and determined by the Secretary of State by his duly appointed Inspector. The Inspector's conclusions were clear and were not challenged pursuant to Section 288 of the 1990 Act, within the prescribed time limits or at all. Having regard to the terms of Section 284 of the 1990 Act, I accept Mr Hicks' submission that the Inspector's conclusions should be treated as both reasonable and final. The present proceedings are not the place to reconsider the merits of the foregoing dispute. Since the development proposals as a whole were found to be in the public interest, so too were the detailed highway works which formed a necessary and related part of those proposals. In those circumstances, I accept Mr Hicks' submission that no reasonable Highway Authority would, on the sole basis of the arguments as to road safety which had been fully considered and determined in the planning process, refuse to enter into any necessary Section 278 Agreement on the grounds that to do so was not a benefit to the public, thereby preventing the development from proceeding. I have therefore come to the conclusion that the decision of the County Council in this case to refuse to enter into the Section 278 agreement in question is both perverse and unreasonable in the Wednesbury sense. As Mr Hicks succinctly put it, it cannot be reasonable for the Highway Authority to allow a decision of the Secretary of State to be implemented only if it agrees with that decision.

There was some debate before us whether that conclusion of *Wednesbury* irrationality was free-standing of the judge's earlier view based on the scheme of the planning legislation as a whole. To my mind it was not: in truth there is here but one issue: who, as between the Secretary of State (or Inspector) on appeal and the highway authority, is to have the last word in deciding a road safety issue of this nature?

I have reached the clear conclusion that the judge below came to the right answer: that following a successful appeal by the developer the relevant highway authority has no option but to co-operate in implementing the planning permission by entering into a section 278 agreement. Although both the judgment below and the arguments before us focused principally upon the scheme of the legislation and whether the highway authority's approach to its section 278 discretion thwarted the policy and objects of the two Acts here in question see, for example, *Padfield v. Minister of Agriculture, Fisheries and Food*[1]—I for my part prefer the broader *Wednesbury* analysis of the case. Indeed, so far from this appeal raising, as Mr Supperstone submitted, "a short point of statutory construction", I see it

[1] [1968] A.C. 997.

rather as raising this simple question: is it reasonable for a highway authority, whose road safety objections have been fully heard and rejected on appeal, then, quite inconsistently with the Inspector's independent factual judgment on the issue, nevertheless to maintain its own original view? To my mind there can be but one answer to that question: a categoric "no". That answer, I should make plain, I arrive at less by reference to any general question regarding the proper legal relationship between planning authorities and highway authorities upon road safety issues than in the light of these basic considerations:

(1) The site access and associated highway works here, together with the road safety problems which they raised, were (a) central (indeed critical) to this particular planning application, and (b) considered in full detail rather than left to be dealt with as reserved matters.

(2) This planning permission was granted following appeal to the Secretary of State and not merely by the local planning authority itself. In the perhaps unlikely event that a local planning authority, having consulted with the highway authority under the provisions of article 18 of the GDO, nevertheless in the face of road safety objections grants a conditional planning permission of the kind granted by the Inspector here, it seems to me less than self-evident that the highway authority would thereby become obliged to co-operate in its implementation by entering into a section 278 agreement. True, Article 12 of the 1977 GDO, by which a local highway authority could give directions restricting the grant of planning permission by a local planning authority in this kind of cases, was repealed by the 1988 GDO, but it does not follow that the local planning authority thereafter in turn became able to dictate the highway authority's course.

(3) There were no new facts or changed circumstances whatsoever following the Inspector's determination of this appeal. The highway authority's continued refusal was based upon the identical considerations that their witness had relied upon in seeking to sustain the planning objection before the Inspector. Quite what change of circumstances would entitle a highway authority in this sort of case to withhold its co-operation after an appeal it is, of course, impossible to lay down in advance. Some help, however, may be found in Sir Thomas Bingham M.R.'s approach in *Onibiyo v. Secretary of State for the Home Department*[2] to the very different question of what constitutes a fresh asylum claim:

> The acid test must always be whether, comparing the new claim with that earlier rejected, and excluding material on which the claimant could reasonably have been expected to rely in the earlier claim, the new claim is sufficiently different from the earlier claim to admit of a realistic prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim.

Adapting that to the present planning context, the highway authority would have to raise a fresh objection sufficiently different from their earlier one to admit of a realistic prospect that, had they advanced it before the Secretary of State on the planning appeal, it might, unlike the earlier one, have prevailed. Whether or not that was indeed the situation would in the first instance be a question for the highway authority itself (just as initially it is for the Secretary of State to decide whether a fresh asylum claim has been

[2] [1996] Imm.A.R. 370.

made); such decisions are, of course, in appropriate cases susceptible to challenge by way of judicial review. Whilst, of course, no such difficulty arises in the present case, it perhaps highlights this, that if Mr Supperstone is right in his main argument, then it would be perfectly open to a highway authority to ignore the planning appeal process entirely, to withhold its witnesses and co-operation when the road safety implications of the development scheme are being debated before the Inspector, and then simply to exercise what effectively amounts to a veto by ultimately declining to enter into a section 278 agreement. This cannot be right. Rather the highway authority should play its full part in the planning process and, in the event that a conditional planning permission is granted, co-operate just like the local planning authority itself in the fulfilment of any relevant conditions.

For these reasons I would reject Mr Supperstones central argument that, even following the grant of planning permission on appeal, the highway authority retain "an independent discretion" to refuse to enter into the requisite section 278 agreement—by which I think he must mean that they remain reasonably entitled to adhere to and act upon their original view that the public would not benefit from this development because of the highway dangers it would create. I believe on the contrary that the Inspector's conclusion on that issue, because of its independence and because of the process by which it is arrived at, necessarily becomes the only properly tenable view on the issue of road safety and thus is determinative of the public benefit. This is not, I should perhaps note, to overlook paragraph 35 of the decision letter, a standard rubric stating that:

> This letter does not convey any approval or consent which may be required under any enactment, bye-law, order or regulation other than s.57 of the Town and Country Planning Act 1990.

Section 57, of course, is the basic provision requiring that development has planning permission. Accepting, as I do, that the highway authority's "approval or consent" is still required before condition eight can be satisfied, my judgment comes simply to this: such approval or consent cannot in the present circumstances properly be withheld. Paragraph 35 is in substance directed to quite other consents, under various Licensing Acts, Building Regulations and the like.

I would accordingly dismiss this appeal.

OTTON L.J. I agree.

MUMMERY L.J. I also agree.

Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

Solicitors—County Solicitor, Warwickshire County Council; Wragge & Co., Birmingham.

Reporter—David Stott.

RICHARDSON v. SECRETARY OF STATE FOR THE ENVIRONMENT AND MILTON KEYNES BOROUGH COUNCIL

QUEEN'S BENCH DIVISION (H.H. Judge Rich, Q.C. sitting as a Deputy High Court Judge): March 13, 1997

Town and country planning—Existing farmhouse too close to motorway when widening scheme implemented—Planning permission refused for substitute farm dwelling in a different location on same farm—Structure Plan allowing for replacement of dwellings—Meaning of replacement—Context Replacement meaning replacement on same site

The applicants lived in a farmhouse by the M1 motorway. The motorway was to be widened and the applicants wished to build an alternative house from which they could continue their farming operation. The Highways Agency had agreed to buy the existing dwelling but had earmarked it for business use rather than demolition. The location chosen by the applicants for the new dwelling was a considerable distance from the existing house and was in open countryside. Buckinghamshire County Structure Plan policy OC1 contained a presumption against development in the open countryside but "limited extension, replacement or alteration of existing dwellings" was allowed. At appeal, the applicants argued that they were replacing their existing dwelling with the new dwelling. The Inspector rejected that submission on the basis that the generally accepted meaning of the term "replace", as applied in planning circles, was to restore to a previous place or position. Consequently, he considered that, as the applicants could not guarantee that the existing dwelling would be demolished and, as the new dwelling was at a distance from the existing dwelling, it was not a replacement of the existing dwelling. The applicants appealed to the High Court.

Held, dismissing the application, that within the context of the Structure Plan policy the word "replacement" meant replacement on the same site.

Application by Mr and Mrs Richardson under section 288 of the Town and Country Planning Act 1990 to challenge a decision of the first respondent whereby he dismissed an appeal against the refusal of Milton Keynes Borough Council to grant planning permission for a dwelling house on land at Eagle Farm, Buckinghamshire. The facts are stated in the judgment of H.H. Judge Rich, Q.C.

Cases referred to:
No cases were referred to.

Jonathan Clay for the applicants.
Jonathan Karas for the first respondent.
The second respondent did not appear.

H.H. JUDGE RICH, Q.C. Mr and Mrs Richardson live on a farm known as Eagle Farm which Mrs Richardson's father first occupied some 40 years ago. The farm is the residue only of that which he farmed because the farm as he farmed it, has been severed and reduced by road works. The road works include the construction of the M1 close to the farmhouse which he occupied and they now occupy. The M1 is proposed to be widened. It is accepted that the conditions in that dwelling house are unbearable by reason of noise from the motorway and will become more so. They wish therefore to build