Neutral Citation Number: [2022] EWHC 238 (Admin)

Case No: CO/2023/2021

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

IN AN APPLICATION FOR JUDICIAL REVIEW

Before :

THE HONOURABLE MR JUSTICE LANE

- -

Between :

THE QUEEN **Claimant**

on the application of

WHITLEY PARISH COUNCIL

and

NORTH YORKSHIRE COUNTY COUNCIL **Defendant**

and

EP UK INVESTMENTS LIMITED

Interested party

- -
- -

For the claimant: Mr R. Kimblin QC (instructed by Irwin Mitchell LLP)
For the defendant: Mr A. Parkinson (instructed by Head of Legal Corporate Services, North Yorkshire County Council)
For the interested party: Mr A. Booth QC and Mr N. Westaway (instructed by by Pinsent Masons LLP)

Hearing dates: 9 and 10 December 2021
Venue: Leeds Combined Court Centre

- -

Approved Judgment

Lane J:

A. PULVERISED FUEL ASH

1. Pulverised Fuel Ash ("PFA") is the ash generated by the burning of coal in coal-fired power stations. PFA has certain qualities that mean it can be used as a building product, including as an aggregate in the production of cement and concrete. PFA is classed as a sustainable/recycled aggregate in the United Kingdom. It can reduce CO_2 emissions, as it reduces the amount of clinker used in cement and concrete; clinker being the stony residue produced by burning coal solely for use by the cement and concrete industry. Using PFA as an aggregate reduces the need for virgin/raw materials, such as limestone, sand and clay, which would otherwise need to be extracted in order to produce cement and concrete.

B. THE SITE AND THE APPLICATION FOR PLANNING PERMISSION

2. This case concerns the grant of planning permission by the defendant on 29 April 2021 to the interested party ("IP") to allow the extraction of PFA from the Gale Common Ash Disposal Site, together with associated development. The resolution of the defendant's Planning and Regulatory Function Committee, which led to the grant, was carried on the casting vote of the Committee's chair. The claimant challenges the lawfulness of that grant. The claimant is the Parish Council for the administrative area in which the site is situated.

3. Planning permission was granted in 1963 for the site to be used for the disposal of ash from Eggborough and Ferrybridge "C" Power Stations. Pipelines transported the ash as a slurry to the site and deposited it directly into lagoons, formed within colliery shale bunds, where the majority of PFA settled and the water was recycled. To provide more capacity, the lagoons were raised in height with more colliery shale, repeating until a particular stage reached its final approved level. Permission was granted in 1988 for the extraction of cenospheres from Stage I on the site, due to the identification of their physical and chemical properties as having economic value. Further permissions were granted in respect of the cenospheres during the 1990s. The depositing of ash at the site ceased, following the closure of Eggborough Power Station in 2018. Stage II has been restored partially to agriculture, with hedges and woodland on the slopes, but is incomplete and unrestored on the top and contains approximately 17 million tonnes of PFA. Stage III ash disposal area is not at final levels and is unrestored, whilst Lagoons C and D are also unrestored.

4. An EIA scoping opinion was issued on 17 January 2019 regarding increased extraction of PFA from the site.

5. As well as permitting the extraction and export of PFA, the challenged grant includes the provision of processing plants, extended site loading pad, upgraded site access arrangements and facilities, additional weighbridges and wheel wash facilities, an extended site office and other ancillary development. It also permits highway

improvement works, a new site access, car parking and ancillary development in connection with proposals for public access.

6. On 4 February 2020, Members of the Committee visited the site, observing aspects of it, including the existing Stages I - III, the location of the current built facilities on site including the offices, existing weighbridge, wheel wash and the former Ash Slurry Dewatering Plant site together with the proposed area for the loading of PFA onto HGVs.

7. An Environmental Statement ("ES") accompanied the planning application. The ES considered landscape and visual amenity, ecology and nature conservation, traffic and transport, air quality and greenhouse gases, noise and vibration, geology, hydrology and contaminated land and cumulative effects and interactions.

8. The total quantity of saleable PFA proposed to be extracted is approximately 23 million tonnes. The proposed duration is 25 years. The development is intended to be in seven phases.

9. The IP will carry out relevant roadworks pursuant to a highways agreement to be agreed with the defendant under the terms of a section 106 agreement, that provides for submission of a programme of works within one year of implementation of the permission or prior to the extraction of 30,000 tonnes of PFA from the site under the permission, whichever is earlier. The IP is also committed to re-examining the potential for alternative means of transporting the material from the site, once the volume of material leaving it reaches 100,000 tonnes per annum.

10. The IP confirmed that it was committed to fully restoring the site, eventually, so as to create the "Gale Common Country Park", to which the public would be given full access.

11. As we shall see, a significant matter is that the site lies wholly within the West Yorkshire Green Belt.

12. The above description of the site and of the application leading to the grant of permission comes from the report of the Corporate Director - Business and Environmental Services to the Committee. This report (hereafter "OR"), together with its associated plans, runs to 113 pages. Given that the OR is the focus of the claimant's challenge, it is necessary for me to refer to it in some detail.

13. Before I do so, however, it is convenient to examine relevant provisions of the National Planning Policy Framework ("NPPF") and of Local Plans.

C. NATIONAL PLANNING POLICY FRAMEWORK

14. Paragraph 133 of the NPPF states:

> "The Government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and they are permanent."

15. Paragraph 134 regards the Green Belt as serving five purposes; namely, to check the unrestricted sprawl of large built-up areas; to prevent neighbouring towns merging into

one another; to assist in safeguarding countryside from encroachment; to preserve the setting and special character of historic towns; and to assist in urban regeneration by encouraging the recycling of derelict and other urban land.

16. Paragraph 143 reads as follows:

> "143. Inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances."

17. Paragraph 144 provides:

> "144. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations."

18. Paragraph 145 provides that a local planning authority should regard the construction of new buildings as inappropriate in the Green Belt, subject to certain exceptions there specified. One such exception is described in paragraph (g): limited infilling or the partial or complete redevelopment of previously developed land, whether redundant or in continuing use, which would not have a greater impact on the openness of Green Belt than the existing development.

19. Paragraph 146 provides that certain other forms of development are also not inappropriate in the Green Belt, provided they preserve its openness and do not conflict with the purposes of including land within it. One such exception is "mineral extraction".

D. NORTH YORKSHIRE WASTE LOCAL PLAN (ADOPTED 2006)

20. Policy 7/3 "Re-working of Deposited Waste" provides:

> "Proposals to re-work deposited waste will be permitted only where:
>
> a) the proposals represent the Best Practicable Environmental Option; and
>
> b) re-working would achieve material planning benefits that would outweigh any environmental or other planning harm which might result."

21. As regards policy 7/3, paragraph 7.17 of the Waste Local Plan states:

> "7.17 There may be instances where the re-working of deposited waste is required to resolve pollution problems or where changed economic circumstances support the re-use of deposited waste for example Pulverised Fuel Ash (PFA). In considering applications for the re-working of material there will be a need to balance the desire to encourage re-use of material and the impact that re-working the material will have on the site and the surrounding area. It is therefore necessary to establish that the proposal represents the Best Practicable Environmental Option. Developers will therefore be expected to demonstrate that they have carried out an appraisal of the options having regard to the social, environmental, economic, land use and resource impacts and that the scheme represents the best available option in the context of the policies of the plan."

E. SELBY CORE STRATEGY LOCAL PLAN (ADOPTED 22 OCTOBER 2013)

22. Paragraph 4.39 of the Selby District Core Strategy Local Plan notes that the NPPF "stresses the importance of protecting the open character of Green Belt, and that 'inappropriate' forms of development will be resisted unless very special circumstances can be demonstrated."

23. Policy SP2 (spatial development strategy) provides, *inter alia,* that development in the countryside will be limited to the replacement or extension of existing buildings, re-use of buildings preferably for employment purposes, and well-designed new buildings of an appropriate scale, which will contribute towards and improve the local economy and where it will enhance or maintain the vitality of rural communities, in accordance with policy SP13, or other special circumstances. In the Green Belt, development must conform to policy SP3 and national Green Belt policies.

24. Policy SP3 (Green Belt), so far as relevant, provides:

> "B. In accordance with the NPPF, within the defined Green Belt, planning permission will not be granted for inappropriate development unless the applicant has demonstrated that very special circumstances exist to justify why permission should be granted."

25. Policy SP13 (scale and distribution of economic growth) states that support will be given to developing and revitalising the local economy in all areas by a number of specified means. These include:

> "B. Strategic Development Management
>
> 1. supporting the more efficient use of existing employment sites and premises within defined Development Limits through modernisation of existing premises, expansion, redevelopment, re-use and intensification. …
>
> C. Rural Economy
>
> In rural areas, sustainable development (on both Greenfield and Previously Developed Sites) which bring sustainable economic growth through local employment opportunities or expansion of businesses and enterprise will be supported, including for example:
>
> 1. The re-use of existing buildings and infrastructure and the development of well-design new buildings.
>
> 2. The redevelopment of existing and former employment sites and commercial premises. …
>
> D. In all cases, development should be sustainable and be appropriate in scale and type to its location, not harm the character of the area, and seek a good standard of amenity."

F. THE OFFICER'S REPORT ("OR")

26. I now return to the OR. At 4.19 to 4.27, the OR noted the views of the defendant's Principal Landscape Architect, communicated on 12 August 2019 and 10 February 2020. The Principal Landscape Architect, whilst welcoming the restoration scheme for the whole of the site, considered that account had not been taken of the fact that Gale Common was already a partly created and restored long-term site, which would be extended for a further 25 plus years; nor did the proposal explain the existing overall landform/landscape design and how this would change. The Principal Landscape Architect considered that the development was likely to have significant adverse landscape and visual affects and impact on Green Belt openness, and more clarification was requested. Given the long duration of the development, mitigation should address the visual and special effects of the development (significant landform alterations, retained buildings and structures) on the openness of the Green Belt. The principle of a Gale Common Country Park was, however, welcomed.

27. At 4.37-4.41, the OR described the objection of the claimant to the planning application. The claimant did not consider that the proposals met the NPPF test for granting planning permission in the Green Belt. Although the principle of PFA extraction was already established for part of the site, a substantial number of HGV traffic movements would occur, if permission was granted. The claimant acknowledged that the IP had "considered using existing waterway and railway infrastructure and welcomed the condition proposed in the Planning Statement." It felt, however, that a review of transportation matters every five years of operation should be required by means of condition. The claimant was also concerned about pupil/parent/siblings using footpaths and crossing the busy A19 to access the primary and nursery school. Increased vehicle movements would have an impact on these.

28. Part 6.0 of the OR is entitled "Planning Policy and Guidance". It begins as follows:

> "6.1 Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that all planning authorities must determine each planning application in accordance with the planning policies that comprise the *Development Plan* unless material considerations indicate otherwise. In this instance, therefore, the *Development Plan* consists of policies contained within a number of planning documents. These documents include:
>
> - any extant planning policies contained within Plan(s) adopted by the County and District (or Borough) Councils *'saved'* under direction of the Secretary of State; and,
>
> - any planning policies contained within *Development Plan* Documents adopted under the Local Development Framework regime.
>
> 6.2 The *Development Plan* for the determination of this particular application comprises the following:
>
> - The 'saved' policies of the North Yorkshire Minerals Local Plan (1997), (NYMLP);
>
> - The 'saved' policies of the North Yorkshire Waste Local Plan (2006), (NYWLP)
>
> - The extant policies of the Selby District Core Strategy Local Plan (2013);

- The 'saved' policies of the Selby District Local Plan (2005);

The policy matters relating to these Local Plans are referenced in paragraphs 6.4 to 6.40 below.

6.3 Weight in the determination process may also be afforded to emerging local policies, depending on their progress through consultation and adoption. In this respect, it is worth noting that the following document contains emerging local policies that are of relevance to this application:

- Minerals and Waste Joint Plan (North Yorkshire County Planning Authority, the City of York Council and North York Moors National Park Authority); hereafter referred to as the MWJP.

The policy matters relating to the MWJP are referenced in paragraphs 6.41 to 6.59 below."

29. 6.19 and 6.20 read as follows:

"6.19 With respect to the 'saved' policies of the North Yorkshire Waste Local Plan (adopted 2006) Policy 7/3 Re-working of Deposited Waste is the relevant one. This states that proposals to re-work deposited waste will be permitted only where the proposals represent the Best Practicable Environmental Option; and re-working would achieve material planning benefits that would outweigh any environmental or other planning harm that might result.

6.20 Paragraph 7.17 accompanies that Policy within the Waste Local Plan. It includes the need to balance encouraging re-use, with the impact that re-working would have on the site and its surroundings, and so it should be demonstrated that the proposal was the Best Practicable Environmental Option available in the context of the policies of the Plan. However, whilst the Best Practicable Environmental Option was national waste policy in 2006, it is not part of the National Planning Policy for Waste (2014). Hence, it is not considered that part a) of this policy can be given any weight in determining this application. However, it is considered that, because part b) relates to the consideration of … whether the benefits of re-working of a deposited waste outweigh any 'environmental or other planning harm', then moderate weight can be given to this policy. This is because the compliance … through consistency with NPPF paragraph 170 principle e) for determining planning applications and NPPF paragraph 180 regarding taking into account the effects of a development, the sensitivity of an area and the proposed mitigations."

30. Consideration of the NPPF begins in detail at 6.60. At 6.73, the OR refers to paragraphs 143 and 144 of the NPPF, regarding the Green Belt. It is specifically noted that paragraph 144 says "very special circumstances" will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations.

31. Part 7 of the OR is entitled "Planning Considerations". 7.2 states that the relevant planning policies include policy 7/3 of the North Yorkshire Waste Local Plan, which relates to the re-working of deposited waste. Reference is also made to policies SP2 and SP13 of the Selby District Core Strategy Local Plan "in respect of the overall location of development and/or development in rural areas".

32. So far as relevant, 7.5 states:

> "7.5 Policy 7/3 of the North Yorkshire Waste Local Plan is a saved policy and, whilst the supporting paragraph 7.15 of that policy states the County Council will continue to fully encourage and support the use of ash waste products. The use of the ash has to weighed relative to the impact that such re-working will have on the site and the surrounding area. There is also no longer a requirement in national waste planning policy to establish whether a proposal represents the '*Best Practicable Environmental Option'* so, as stated in paragraph 6.20 above, no weight can be given to part a) of Policy 7/3. However, in considering the balance between use of the waste and points relating to 'environmental or other planning harm', moderate weight can be given to part b) of Policy 7/3. …"

33. At 7.10, it is said that there was a justification for continuing the use of the PFA resource of the site, albeit by means of a different process (being excavation from a previous deposit, rather than a specific stockpile), since this would be redevelopment of an existing former employment site. As such, it would be compliant with policy SP13 Part C2 of the Selby District Core Strategy Local Plan. As for Part D of the policy SP13 – whether the development would be sustainable, appropriate in scale and type to its location, not harm the character of the area and seek a good standard of amenity – at 7.10 it is said that this would be discussed later in the report.

34. 7.15 *et seq* of the OR concern the Green Belt. 7.16 describes how the "construction of the mound over the past 50 years has created a hill feature within the generally flat landscape of the valley of the River Aire and that over the years "the hill, its slopes and planting have developed and been managed, together with hedgerows as a visual affect". The OR continues as follows:

> "7.17 However, as paragraphs 6.73 and 6.74 above state, the NPPF position is that inappropriate development is by definition harmful to the Green Belt. Such development should not be approved except in very special circumstances and that substantial weight is given to any harm to the Green Belt and that these circumstances 'will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations'. The extraction of PFA is a 'mining operation', and, as acknowledged by the District Council, it is an aim of the NPPF policy stated in paragraph 204 b) to, in so far as is practicable, facilitate the sustainable use of minerals including the contribution that secondary and recycled materials can make. However, although PFA exports from Gale Common continue within the current 30,000 tonne a year limit, in terms of paragraph 204 e) of the NPPF Gale Common is not, in policy terms, a safeguarded site for 'the handling, processing and distribution of substitute, recycled and secondary aggregate material'. Rather, in the emerging MWJP, the proposal is for safeguarding the site as a 'landfill (restricted/specialised)'. Therefore, it is necessary to consider whether very special circumstances exist.
>
> 7.18 As stated in paragraph 6.71 above, NPPF paragraph 134 states that Green Belt serves five purposes. With regard to these, the development would not contribute to, and therefore will not conflict with purpose a) regarding any sprawl of any built-up area, or purpose b) regarding merging of towns. This is because, whilst the development, does involve approximately 1281m^2 of built development (compared to the existing amount of approximately 1128 m^2), it does not represent a sprawl of a large built-up area, and would not result in towns or villages merging into one. Indeed, the two figures for the area of built development above do not factor in the approval of demolition of buildings as given by Selby District Council, such as the ASDP and

> the pipe bridges which will, once undertaken, reduce the overall built impact of development previously associated with Gale Common in the wider landscape."

35. At 7.20, the OR notes that paragraph 145 of the NPPF advises that new building construction should be regarded as inappropriate in the Green Belt, subject to certain exceptions. The OR concludes that the proposed buildings did not come within paragraph 145(c) or (d) of the NPPF but will comprise a limited redevelopment of previously developed land, which would not have a greater impact on the openness of the Green Belt than then existing development and so would come within the exception in paragraph 145(g). Furthermore, in terms of policy SP2, the proposed built development would be limited to replacing or extending existing buildings and the re-use of buildings for employment purposes.

36. At 7.21, the OR notes that the site has not been free from built developments since construction started in the 1960's and that, in terms of paragraph 145(g) of the NPPF, the re-development would not have a greater impact on the openness of the Green Belt than the existing development. The existing perimeter landscaping would largely screen the buildings, which would effectively be a modernisation of the existing onsite facilities: "Nonetheless … the proposed development does not come within the forms of development considered appropriate in the Green Belt, although they would contribute to the site being used as a source of secondary aggregate".

37. At 7.24, the OR considers that the proposed built development would not be harmful to the Green Belt, given that the proposed locations within the site for the built development would be in the same two parts of the site that currently have existing buildings. Accordingly, the built element of the application would not represent inappropriate development and so not be in conflict with SP3. The building element would not conflict with NPPF paragraph 133 as the land would "essentially remain open".

38. At 7.25, the OR summed up that "on balance, the openness of the Green Belt will be preserved".

39. At 7.28, it is noted that whilst NPPF paragraph 146 states that some development is not inappropriate in the Green Belt, including mineral extraction, PFA was not considered to be a "mineral" and therefore did not fall within that exception:

> "7.28. Therefore, as inappropriate development is, by definition, harmful to the Green Belt and should not be approved, except in very special circumstances, it is necessary therefore to consider whether 'very special circumstances' actually do exist. These special circumstances will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations."

40. 7.29 acknowledges that the Gale Common mound has become a significant distinctive feature in the landscape. Since the existing landscape of Stage I would be maintained, under the proposals, together with new landscaping for Stages II and III and Lagoon C and D, the proposal would not compromise the local distinctiveness, character and form of the landscape.

41. 7.30 examines the proposals for lighting, in the context of openness. 7.31 addresses the potential impact on openness of HGV movements.

42. Concerning policy SP3, 7.32 of the OR notes that the IP was of the view that, in considering the issue of very special circumstances, the positive properties of PFA, its contribution to sustainability, including the avoidance of using virgin material, reduced CO_2 emissions, the replacement of such material in building products, the significant need for PFA, the limited remaining supplies of the same, the significantly improved restoration of the site and job creation and economic benefits, constituted very special circumstances.

43. At 7.33, those benefits of PFA are, in substance, accepted. 7.33 concludes as follows:

> "7.33. Consequently, in combination these features support that very special circumstances do exist because of the potential that the PFA has as a source of secondary aggregate. This outweighs any potential harm to the Green Belt because of inappropriateness, and any other harm resulting from the proposal such that there is no conflict with Policy SP2 (d) and SP3 or with the national Green Belt policies as set out in the NPPF."

44. 7.34 to 7.46 of the OR occur under the heading "Highways Matters". Various means of minimising the impact of additional HGV use are examined. Although section 106 agreements had been suggested in this regard, 7.42 envisages the IP's commitment to establishing alternatives to road transport being secured by means of an appropriately worded planning condition.

45. 7.47 to 7.62 occur under the heading "Local Amenity". Here, the OR deals with hours of operation, noise, lighting, air quality, including dust, cleanliness of the road and pedestrian amenity.

46. 7.63 to 7.74 have the heading "Landscape and Visual Impact". At paragraph 7.66, the OR observes that the Principal Landscape Architect "still considered in February 2020 that [the proposal] was likely to include significant adverse landscape effects which, unless sufficiently mitigated, would be likely to be contrary to landscape policy". The Principal Landscape Architect felt that residual effects with regard to Stage II would essentially not be mitigated until restoration commenced and that there would "albeit temporarily" be "a negative impact on the localised character of the area during the period until restoration has begun". He also considered that "the temporary negative impact on the localised character of the area during the significant period until restoration is complete means that the development as proposed is contrary to policy SP13."

47. At 7.73, it is noted that the IP had originally proposed that its restoration schemes would be subject to a section 106 Agreement. However, the OR concluded "that these should be submitted as requirements within any grant of planning permission as set out in Conditions 32-37 of section 9.1 below".

48. At 7.74, it is "considered that the proposal is capable of being designed with landscaping and screening to effectively mitigate the impact of the proposal, subject to the control of the development by means of planning conditions, and the terms of a Section 106 Agreement". 7.74 ends as follows:

> "Therefore, in terms of policy compliance with the landscaping issues outlined with respect to compliance with MWJP Policy M11 part 2) and Policy SP3 above, it is also not considered to be in accordance with 'saved' Policy 4/1 criterion (d) of the NYMLP and is not compliant in terms of the cumulative effects arising from the changes to the landscape

with regard to the requirements of Policy 4/1 criterion i of the NYMLP and Policy D06 of the emerging MWJP."

49. In a Supplementary Report placed before the Committee, 7.74 was amended as follows:

> "Addendum
>
> 7.1 There are typographical errors within paragraph 7.74 of the Substantive Report including an erroneous reference to policy SP3. The final sentence of that paragraph should have read as follows: "Therefore, in terms of the landscaping issues outlined above, the development is compliant with MWJP Policy M11 part 2), with Policy SP13 of the Selby District Core Strategy and with 'saved' policy 4/1 criterion (d) of the NYMLP. It is also compliant in terms of the cumulative effects arising from the changes to the landscape with regard to the requirements of policy 4/1 criterion i of the NYMLP and Policy D06 of the emerging MWJP".

50. Under the heading "Economic impacts", 7.109 of the OR refers to the Selby District Core Strategy Local Plan Policy SP13, concluding that the proposal "would comply with respect to re-using existing buildings and infrastructure and would be a redevelopment of an existing and former employment site, and would comply with that part and for the reasons as set out in paragraph 7.9 in this report [a misprint; paragraph 7.74 is intended] it is not considered that the proposal is contrary to part D of policy SP13 in terms of scale of the development to the location and not harming the character of the area".

51. Part 8 of the OR contains the conclusions. 8.1 reiterates that the Committee's decision "must be made in accordance with the extant policies of *'the development plan'* as defined, unless there are material considerations, including any impacts upon interest of acknowledged importance that would indicate that planning permission should not be forthcoming." It is stated that the "assessment of material considerations within the overall 'planning balance' has been conveyed within section 7.0 above". It continues:

> "8.2 There are a range of policies in the '*Development Plan'* to which due regard must be had, as well as a number of other material considerations. In considering the relationship of the proposal to the '*Development Plan'*, Members should note that proposal should be judged against the '*Development Plan'* as a whole rather than against individual policies in isolation and acknowledge that it is not necessary for proposals to comply with all policies to be found compliant. Members will also need to bear in mind, as set out in Section 6, the relative weight to be attached to the policies in the *'Development Plan'* relevant to this proposal against that which is laid down within national planning policy.
>
> 8.3 Following the considerations set out in Section 7.0 above, it is considered that the proposal complies with the development plan as following:
>
> 1. North Yorkshire Mineral Local Plan (1997) 'saved' Policies: 4/1 regarding the acceptability of the overall proposal; 4/6A in respect of nature conservation and habitat protection; 4/10 regarding the protection of the water environment; 4/13 traffic impact; 4/14 impact on the local environment and amenity, 4/16 regarding ancillary and secondary operations, 4/18 restoration to agriculture and 4/20 aftercare.
>
> 2. The emerging Minerals and Waste Joint Plan Policies D02 local amenity and cumulative impacts, D06 landscape, D09 water environment, D10

reclamation and aftercare, D11 sustainable design and operation, and, D12 Protection of agricultural land and soils.

3. Selby District Core Strategy Local Plan (2013) Policies: SP(2) regarding development in the countryside; SP3 as it is not considered that the proposed built development would be harmful to the Green Belt and very special circumstances exist that outweigh any harm to the Green Belt because of the potential that the PFA has as a source of secondary aggregate; SP12 regarding public access; SP13 regarding the redevelopment of a former employment site, SP15 in respect being sustainable and contributing to climate change mitigation; SP18 protecting and enhancing the environment; and, SP19 regarding the quality of the design.

4. Selby District Local Plan (2005) 'saved' Policies: ENV1 regarding control of development; ENV2 regarding environmental pollution; Policy ENV9 Sites of Importance for Nature Conservation; and Policies T1 regarding highway network, T2 in respect of access to roads and T7 regarding provision for cyclists.

8.4 As described in paragraph 7.4 above, the principle of PFA extraction from the Gale Common Ash Disposal Site is not a totally new development with regard to material being sourced to supply various businesses as it has been occurring under the terms of various planning permissions since the 1980s. Initially at Gale Common it was just the cenospheres element of the PFA, but more recently has been in respect of PFA in general. Hence, there is an existing market for the material which can be used for a variety of purposes and the development would contribute to the local economy and would come within the scope of the types of development coming within Policy SP13 part C2 of the Selby District Core Strategy Local Plan. The North Yorkshire Waste Local Plan Policy 7/3 supports proposals that facilitate the supply and use of secondary aggregate as an alternative to primary land-won aggregates, such as from PFA. Policy M11 of the emerging MWJP also supports the principle of use of PFA. The built element of the planning application is considered to be proportionate to the development being proposed and compliant with Policy 4/16 of the North Yorkshire Minerals Local Plan and Policy SP2(c) of the Selby District Core Strategy Local Plan and would be sustainable in terms of MWJP Policy D01. It is an aim of the NPPF to facilitate the sustainable use of minerals including the contribution that secondary and recycled materials can make.

8.5 The proposal is for a substantially enlarged development, 23 million tonnes over 25 years, relative to that which has taken place to date and which has been restricted to 30,000 tonnes per year since 2003. There is though a planning balance to judge between the supply of the PFA as a contribution to the economy via the supply of secondary aggregate and the following impacts. The site being located within the Green Belt; the impact of disturbing a partially restored significant recognisable feature in the wider landscape which is relevant to Policy M11 Part 2).; the impacts on the environment and amenity; the transport implications, the proposals for restoration and aftercare and the cumulative effect on the local area.

8.6 The Gale Common site has throughout its development and existence, over the past 50 years, been within the West Yorkshire Green Belt; and, that belt was originally established with a principal objective of checking further growth of the West Yorkshire Conurbation. The extraction of PFA is a 'mining operation', and very special circumstances do exist because of the potential that the PFA has as a source of secondary aggregate, and that outweighs any potential harm to the Green Belt because of inappropriateness, and any other harm resulting from the proposal. The

built element of this application would not be harmful and will not be inappropriate development in the Green Belt in respect of paragraph 143 of the NPPF. …

8.7 The proposal would be acceptable in planning terms with regard to 'saved Policy 4/13 of the North Yorkshire Mineral Local Plan, 'saved' Policy ENV1 part 2, and 'saved' Policies T1 and T2 of the Selby Local Plan and the NPPF, including with regard to highway safety. Subject to the undertaking of the proposed works to the access and the updating of the on-site traffic arrangements, particularly, in the vicinity of the weighbridge and regarding vehicle parking. Together with proposed offsite road improvements to Whitefield Lane, the controlling of the release of the HGVs from the site are undertaken in full in order to ensure that the roads can safely serve the development and subject to the completion of the Section 106 matters as discussed in Section 7 above.

8.8 Taking account of all the material considerations it is considered that on balance that the benefits of using the PFA as a secondary aggregate outweigh the negative aspects associated with the development, and that very special circumstances exist that outweigh the development being inappropriate in the Green Belt. Amenity safeguards can be put in place via planning conditions and obligations to ensure that the intensity of any impacts, longevity and cumulative impact that the development would have on the amenities of local residents in the vicinity of the site, regarding hours of operation, noise or dust emission, visual impact and regarding traffic are effectively mitigated and controlled."

G. DRAFT MINUTES OF THE COMMITTEE MEETING

52. I have been supplied by the claimant with draft minutes of the meeting of the defendant's Planning and Regulatory Functions Committee on 17 November 2020. No issue has been taken regarding the accuracy of the draft.

53. During the Members' discussion, we observe that:

> "A Member referred to the emerging Minerals and Waste Joint Plan and the need to divert away from the use of primary materials in favour of secondary materials, and considered that the ash to be taken from this process could be seen as recycled material, and would correlate with the Joint Plan. In response it was emphasised that the Joint Plan had yet to be agreed, and the policies could be subject to change, however, it was true to say that use of this material would assist in replacing the use of primary materials in areas such as the construction industry, and, in that respect, could be considered to be using recycled material".

54. Later on, we find this:

> "A Member noted that the Authority's Principal Landscape Architect had raised concerns regarding the application and had asked for mitigation measures to be introduced on Whitefield Lane in view of the increase of HGVs proposed along that route, and he wondered whether that issue had been addressed. In response it was noted that the mitigation referred to had been addressed in the report and that the Landscape Architect had not objected to the report".

H. LETTERS FROM THE DEFENDANT'S PRINCIPAL LANDSCAPE ARCHITECT

55. In his letter of 14 October 2019 to Planning Service, Mr Wainwright, the defendant's Principal Landscape Architect, stated that:

> "I object to the application in its current form, which does not sufficiently demonstrate that landscape and visual effects are within acceptable limits and with a suitably agreed landscape restoration, maintenance/after-care scheme. There is also a potential to adversely affect the openness of Green Belt, which is not sufficiently explained."

56. In his letter to Planning Services dated 10 February 2020, Mr Wainwright noted that the IP "has submitted further information in relation to the original submission (including a Gale Common Country Park; Restoration and After-Care Strategy, and a Green Belt report)". The letter continues:

> "I have no objection to the above application subject to appropriate mitigation being resolved and secured."

57. The letter then set out what was considered to be necessary mitigation. Amongst other things, Mr Wainwright said mitigation must take account of the long-term cumulative landscape and visual effects of the scheme and its long-term operational effects. Detailed landscaping submissions would be required in advance of each of the main restoration stages. The principle to restore the site as a country park was welcomed, but this should include car parking, a visitor centre and interpretation. Retention and re-use of redundant buildings and structures was not compatible with the long-term aspiration to restore the site to a country park and there should be clear proposals for the demolition or removal of all existing buildings and structures following restoration of the site as such a park.

I. THE CLAIMANT'S CHALLENGE IN OUTLINE

58. The claimant advances six grounds of challenge to the lawfulness of the grant of permission by the defendant to the IP. Ground 1 contends that the OR, which it is accepted comprises the reasons for the grant of permission by the defendant's Committee, is contrary to the authority of the Court of Appeal in Kemnal Manor Memorial Gardens Ltd v First Secretary of State [2006] 1 P. & C.R. 10. In dealing with a proposal in terms of Green Belt policy, it is not appropriate to divide up the development proposal into those parts which would be appropriate development in the Green Belt and those parts which would be inappropriate development. A proposed development is not to be seen as acceptable in Green Belt policy terms merely because part of it is appropriate.

59. Further, none of the exceptions for the construction of new buildings in the Green Belt as not being inappropriate were, the claimant says, relevant and the OR erred in this further respect.

60. Ground 2 contends that the OR failed to take "any other harm arising from the proposal" into account, alongside Green Belt harms, in deciding whether very special circumstances existed, such as to permit the development in the Green Belt.

61. Ground 3 concerns policy 7/3 (re-working of deposited waste) of the North Yorkshire Waste Local Plan 2006. The claimant contends that the OR was wrong to say the fact that policy 7/3(a) (which requires the proposals to represent the Best Practicable Environmental Option) is not consistent with national policy means "no weight can be given" to that policy. The OR fettered the defendant's discretion to give whatever weight the decision-maker considered appropriate to this aspect.

62. Ground 4 asserts that policy 7/3(a) raised the need to consider alternatives. However, because the OR barred any consideration of the Best Practicable Environmental Option, no such alternatives were considered.

63. Ground 5 asserts that the OR failed to make a lawful determination, in accordance with the planning legislation, as against the development plan. This was because, when giving reasons, the OR conflated the development plan policies (i.e. existing policies) with those in the emerging Minerals and Waste Joint Plan. The policies referred to at 8.3(2) of the OR were not part of the development plan.

64. Ground 6 alleges that there is a clear finding in the OR that the IP's proposal does not accord with policy SP13 Part D; whereas it is stated in Part 8 of the OR that there is compliance with SP13. This conclusion is said to be seriously misleading.

J. PERMISSION TO BRING JUDICIAL REVIEW

65. Permission to bring judicial review was granted on all grounds. The granting judge, however, said that "whilst some grounds are not as meritorious as others, permission is granted in respect of all grounds. However, the claimant is encouraged to adopt a focused approach in his skeleton argument".

66. This observation led to criticism of the claimant at the hearing in December 2021. Both the defendant and the IP submitted that Mr Kimblin QC's skeleton argument did not attempt to focus or refine the Grounds in the light of the granting judge's comments. This is said unreasonably to have put the other parties to the trouble of responding to "less meritorious grounds that should (at least) have been refined, if not dropped altogether" (paragraph 5 of the IP's skeleton argument).

67. Since the granting judge did not give any indication as to which of the claimant's Grounds he considered to be "not as meritorious as others", Mr Kimblin cannot, in this regard, properly be criticised by the defendant and the IP.

K. CASE LAW

68. Apart from the cases on the proper application of section 31(2A) of the Senior Courts Act 1981, there is a good deal of overlap in respect of the issues raised in the case law concerning the present challenge. I shall therefore address these cases in what I hope is chronological order.

69. I have mentioned Kemnal Manor when summarising the claimant's Ground 1. In that case, the appellant applied for outline planning permission to redevelop a privately-

owned sports ground and pavilion, into a cemetery and crematorium which included a chapel, garden of remembrance and new access road. Permission was refused by the local planning authority and, on appeal, by an inspector. The latter reasoned that, whilst cemeteries were, by virtue of national policy, appropriate development in the Green Belt, crematoria were not. Looking at the proposal as a whole and taking account of the fact that 72% of all deaths involved a crematorium-based funeral, the inspector concluded that the viability of the proposal was dependent upon the provision of a crematorium. On balance, the elements of the proposal would cumulatively reduce the openness of the Green Belt and there were no special circumstances to outweigh the harm that would be caused, in the inspector's view.

70. Dismissing the appellant's challenge to the inspector's decision, Keene LJ, giving the court's judgment, held at paragraph 34 that:

> "At this stage of the analysis, it was not appropriate to try dividing the development proposal up into segments, into those parts which would be appropriate and those which would be inappropriate. At this stage of dealing with the matter as a question of green belt policy, this was to be treated as a single development proposal and, as the inspector pointed out at para 12, the crematorium aspect was in no sense insignificant. … I would emphasise that a development is not to be seen as acceptable in green belt policy terms merely because part of it is appropriate. That would be the fallacy committed by the curate when tackling his bad egg".

71. In R (Langley Park School for Girls Governing Body) v Bromley LBC [2010] 1 P. & C.R. 10, the Court of Appeal quashed a planning permission granted by reference to an officer's report. The central issue was the impact of the proposal on the openness and visual amenity of Metropolitan Open Land ("MOL"). Although the Officer's Report said that impact on the MOL was one of the main issues to be considered, the report did not contain any analysis of that impact, nor any conclusions as to the extent (if any) to which the openness and visual amenity of the MOL would be injured by the proposal. Accordingly, Sullivan LJ, giving the judgment of the court, concluded that Members of the relevant committee "would have found it difficult, if not well-nigh impossible, to reach any meaningful conclusion, given the complete lack of information … in the report" (paragraph 49). The report was not to be saved because it contained the "mantra-'each planning application must be considered on its merits'" (paragraph 43).

72. On the issue of whether the report should have considered alternatives to the proposals, Sullivan LJ held at paragraph 45 that "where there are clear planning objections to a proposed development … the more likely it is that it will be relevant, and may in some cases be necessary, to consider whether that objection could be overcome by an alternative proposal". That principle must apply "with equal, if not greater, force if the suggested means of overcoming the clear planning objection is not that the development should take place on a different site altogether, but that it should be sited differently within the application site itself". (paragraph 46).

73. In Timmins and Anor v Gedling Borough Council and Anor [2014] EWHC 654 (Admin), Green J discussed the relationship between an officer's report and a decision of the relevant committee on a planning application:

> "82. It also needs to be borne in mind that the Officers' report is not the Decision of the Planning Committee itself. It is guidance to them which includes advice and recommendations. In the absence of detailed reasons from the Planning Committee

itself a Court can *prima facie* assume that the guidance, advice and recommendations contained within that report were accepted: See paragraph [46] above. However, sometimes the notes of the Planning Committee will themselves be available and can be assessed: see e.g. *Heath & Hampstead* (ibid) paragraphs 39 *et seq*. In this connection the Courts have recognised that the members of Planning Committees are well versed in the issues that relate to their locality and come to the decision they are required to take with local knowledge and understanding. They can also, as a collective, be treated as having some experience in planning matters: See e.g. per Sullivan J in *Fabre* (ibid) at page 509. It is not therefore to be assumed that every infelicity of language or expression by the Officer or every mis-description of the relevant test will necessarily have exerted any material impact upon the Committee even in respect of reports that are accepted by the Committee. To conclude otherwise would mean that even if the decision of the members was taken in an altogether impeccable manner with experienced members directing themselves perfectly, their decision would nonetheless be at risk of being quashed because the Officers report contained infelicities or ambiguities which the Committee had recognised and ignored."

74. In Arsenal Football Club PLC and Secretary of State for Communities and Local Government and Anor [2014] EWHC 2620 (Admin), Cranston J was concerned with a challenge under section 288 of the Town and Country Planning Act 1990 to a decision of the Secretary of State's planning inspector who, after a six day inquiry, refused Arsenal Football Club Ltd's application to vary conditions imposed by the local planning authority in respect of planning applications for the Emirates Stadium. For our purposes, the following paragraphs of the judgment are relevant:

> "32. The third strand of relevant legal principle concerns the standards the courts require of planning decisions. Oft quoted in this regard is the passage in Seddon v Secretary of State for the Environment (1981) 42 P&CR 26, at 28, that it is no part of the court's duty to subject planning decision to the kind of scrutiny appropriate to the determination of the meaning of a contract or a statute. In South Lakeland District Council v Secretary of State for the Environment [1992] 2 AC141, 148 G, Lord Bridge (with whom other members of the judicial committee agreed) said that decision letters should be read fairly and as a whole and without excessively legalistic textual criticism. Hoffmann LJ put the same point in a slightly different way in South Somerset District Council and the Secretary of State for the Environment **v** David Wilson Homes (Southern) Ltd (1993) 66 P & CR 83, at 83E-F, that an inspector is not writing an examination paper and decision letters must be read in good faith. Another of the great judicial figures of recent times, Sir Thomas Bingham MR, summed up the matter in Clarke Homes Limited v Secretary of State for the Environment and East Staffordshire District Council (1993) 66 P & CR 263, at 271-272:
>
> > "There are dangers in over-simplifying issues of this kind as also of over-complicating them. I hope I am not over-simplifying unduly by suggesting that the central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."
>
> 33. I would only add that as with a judgment, the appellate body must appreciate how the parties' case was put, since that will bear on how the decision is structured and what parts of the case are given emphasis in it. Moreover, the appellate body should

not be expecting that the decision will necessarily flow in a linear manner, part by part, paragraph by paragraph, with the conclusion at the end. That would be a counsel of perfection. The reality is that the decision may have been reached by considering the material as a whole and not by a stage by stage process, each stage considered in isolation. Thus in putting pen to paper a statement at a particular part of the decision may be based not only on what comes before it but it may anticipate what follows. It is artificial to expect the written decision to proceed paragraph by paragraph if the conclusion itself derived from a far from logical process. What is required is that the decision be read in good faith and understood as a whole.

34. Closely related to how courts should read planning decisions is the issue of what they must contain. In one of the most quoted passages in modern planning cases, Lord Brown said in South Bucks District Council v Porter (No 2) [2004] UKHL 33; [2004] 1 WLR 1953, at [36], that the reasons given for a decision must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal controversial issues, but that reasons can be briefly stated. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law but such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration and a reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

75. In Redhill Aerodrome Ltd v SSCLG and others [2015] PTSR 274, Sullivan LJ, giving the judgment of the Court of Appeal, had this to say about the provisions in the NPPF concerning Green Belt policy:

"32. The Framework does not purport to alter the statutory duty to have regard to "any other material consideration" when determining a planning application or appeal: see section 70(2) of the Act. When deciding whether "material considerations indicate otherwise" the local planning authority or the Inspector on appeal will consider all of the material considerations, those which point in favour of granting permission, and those considerations which, in addition to the conflict with the development plan, point against the grant of permission. In the former category there may well be employment and economic considerations of the kind referred to in the Inspector's decision in the present case. If the proposed development would cause some, but not significant harm to biodiversity; some, but not substantial harm to the setting of a listed building; and some, but not severe harm in terms of its residual cumulative transport impact, those harmful impacts will fall within the "material considerations" which point against the grant of permission. The fact that a refusal of planning permission on biodiversity grounds, heritage grounds or transport grounds would not be justified does not mean that the harm to those interests would be ignored. The weight to be given to such harm would be a matter for the Inspector to decide in the light of the policies set out in the Framework, but it would not cease to be a "material consideration" merely because the threshold in the Framework for a refusal of planning permission on that particular ground was not crossed. The position is no different if development is proposed within the Green Belt, save that the "very special circumstances" test will be applied if the proposal is for inappropriate development in the Green Belt.

33. The second fallacy in the Respondent's submission is the proposition that "any adverse transport impact, even if far less than severe….would lead to a refusal of planning permission unless 'clearly outweighed' by 'very special circumstances.' " The harm that must be "clearly outweighed by other considerations" is not simply the less than severe transport harm, but the harm to the Green Belt by reason of

> inappropriateness and "any other harm", which would include, but would not be limited to the less than severe transport harm. If, having carried out this balancing exercise, the Inspector concluded that "very special circumstances" did not exist, she would refuse planning permission, not on transport grounds, but on the ground that the proposed development did not "comply with national policy to protect the Green Belt set out in the Framework": see the Inspector's decision in this case (paragraph 6 above)."

76. In R (Lee Valley Regional Park Authority) v Epping Forest DC J.P.L [2016] 1009-1033, Lindblom LJ, giving the judgment of the Court of Appeal, held that the first sentence of paragraph 88 of the NPPF (now paragraph 145) must not be read in isolation from the policies that sit alongside it. Reading the relevant policies together, it is clear that "buildings for agriculture and forestry" and other development that is not "inappropriate" in the Green Belt, are not to be regarded as harmful, either to the openness of the Green Belt or to the purposes of including land within the Green Belt. The distinction between development that is "inappropriate" and that which is not "inappropriate" (i.e. appropriate) governs the approach a decision-maker must take in determining an application for planning permission. "Inappropriate development" is, by definition, harmful, whereas development in the accepted categories in the NPPF is not. This is not a matter of planning judgement; it is simply a matter of policy. The appellant's purported distinction between "definitional" and "actual" harm to the Green Belt was logically flawed. Appropriate development is regarded by government as not inimical to the fundamental aim of the Green Belt, or to the essential characteristics of Green Belts, or to the five purposes served by the Green Belt (paragraphs 16-19).

77. R (Mansell) v Tonbridge & Malling BC [2019] PTSR 1452 contains Lindblom LJ's already well-known summary of the correct approach of the court to an officer's report to a planning committee:

> "42. The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarize the law as it stands:
>
> (1) The essential principles are as stated by the Court of Appeal in *R. v Selby District Council, ex parte Oxton Farms* [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge L.J., as he then was). They have since been confirmed several times by this court, notably by Sullivan L.J. in *R. (on the application of Siraj) v Kirklees Metropolitan Borough Council* [2010] EWCA Civ 1286, at paragraph 19, and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J., as he then was, in *R. (on the application of Zurich Assurance Ltd., t/a Threadneedle Property Investments) v North Lincolnshire Council* [2012] EWHC 3708 (Admin), at paragraph 15).
>
> (2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as he then was, in *R. v Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500, at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in *Palmer v Herefordshire Council* [2016] EWCA Civ 1061, at paragraph 7). The

> question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.
>
> (3) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R. (on the application of Loader) v Rother District Council* [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *Watermead Parish Council v Aylesbury Vale District Council* [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, *R. (on the application of Williams) v Powys County Council* [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere."

78. The judgment of Lord Carnwath in R (Samuel Smith old Brewery) Tadcaster and Anor v North Yorkshire County Council [2020] UKSC 3 is relevant both as to Green Belt policy in the NPPF and as to the correct approach to a planning officer's report. On the former, Lord Carnwath (giving the judgment of the Supreme Court) endorsed what Lindblom LJ, had said in Lee Valley, confirming that the NPPF had affected no significant change of approach from the former PPG 2 policies on the Green Belt.

79. At paragraph 24, Lord Carnwath disapproved the finding of Green J in Timmins that there was a clear conceptual distinction between openness and visual impact; and that it was wrong in principle to arrive at a specific conclusion as to openness by reference to visual impact. Lord Carnwath noted that this finding had already been disapproved in Turner v Secretary of State for Communities and Local Government [2017] 2P & CR 1 at paragraph 18.

80. Beginning at paragraph 29, Lord Carnwath addressed the issue of material considerations in planning law:

> "Material considerations
>
> 29. Section 70(2) of the Town and Country Planning Act 1990 ("the Act") required the council in determining the application to have regard to the development plan and "any other material consideration". In summary Samuel Smith's argument, upheld by the Court of Appeal, is that the authority erred in failing to treat the visual effects, described by the officer in her assessment of "Landscape impact" (para 17 above) as "material considerations" in its application of the openness proviso under para 90.

30. The approach of the court in response to such an allegation has been discussed in a number of authorities. I sought to summarise the principles in *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2009] EWHC 1729 (Admin); [2010] 1 P & CR 19. The issue in that case was whether the authority had been obliged to treat the possibility of alternative sites as a material consideration. I said:

> "17. It is one thing to say that consideration of a possible alternative site is a potentially relevant issue, so that a decision-maker does not err in law if he has regard to it. It is quite another to say that it is *necessarily* relevant so that he errs in law if he fails to have regard to it …
>
> 18. For the former category the underlying principles are obvious. It is trite and long-established law that the range of potentially relevant planning issues is very wide (*Stringer v Minister of Housing and Local Government* [1970] 1 WLR 1281); and that, absent irrationality or illegality, the weight to be given to such issues in any case is a matter for the decision-maker (*Tesco Stores Ltd v Secretary of State for the Environment and West Oxfordshire District Council* [1995] 1 WLR 759, 780). On the other hand, to hold that a decision-maker has erred in law by *failing* to have regard to alternative sites, it is necessary to find some legal principle which compelled him (not merely empowered) him to do so."

31. I referred to the discussion of this issue in a different context by Cooke J in the New Zealand Court of Appeal, in *CreedNZ Inc v Governor General* [1981] 1 NZLR 172, 182 (adopted by Lord Scarman in the House of Lords in *In re Findlay* [1985] AC 318, 333-334, and in the planning context by Glidewell LJ in *Bolton Metropolitan Borough Council v Secretary of State for the Environment and Greater Manchester Waste Disposal Authority* (1991) 61 P & CR 343, 352):

> "26. Cook J took as a starting point the words of Lord Greene MR in the *Wednesbury* case [1948] 1 KB 223, 228: 'If, in the statute conferring the discretion there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters.' He continued:
>
> 'What has to be emphasised is that it is only when the statute *expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation* that the court holds a decision invalid on the ground now invoked. It is not enough that it is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision ...' (Emphasis added)
>
> 27. In approving this passage, Lord Scarman noted that Cook J had also recognised, that –
>
> '… in certain circumstances there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the ministers … would not be in accordance with the intention of the Act.' (*In re Findlay* at p 334)
>
> 28. It seems, therefore, that it is not enough that, in the judge's view, consideration of a particular matter might realistically have made a difference.

> Short of irrationality, the question is one of statutory construction. It is necessary to show that the matter was one which the statute expressly or impliedly (because 'obviously material') requires to be taken into account 'as a matter of legal obligation'."

32. Mutatis mutandis, similar considerations apply in the present case. The question therefore is whether under the openness proviso visual impacts, as identified by the inspector, were expressly or impliedly identified in the Act or the policy as considerations required to be taken into account by the authority "as a matter of legal obligation", or alternatively whether, on the facts of the case, they were "so obviously material" as to require direct consideration."

81. Allowing the appeal, Lord Carnwath held at paragraph 39 of his judgment that "matters relevant to openness in any particular case were a matter of planning judgment, not law". At paragraph 41 he held:

> "41. … the officer was entitled to take the view that, in the context of a quarry extension of six hectares, and taking account of other matters, including the spatial separation noted by her in para 7.124, they did not in themselves detract from openness in Green Belt terms. The whole of paras 7.121 to 7.126 of the officer's report address the openness proviso and should be read together. Some visual effects were given weight, in that the officer referred to the restoration of the site which would be required. Beyond this, I respectfully agree with Hickinbottom J that such relatively limited visual impact which the development would have fell far short of being so obviously material a factor that failure to address it expressly was an error of law. For similar reasons, with respect to Mr Village's additional complaint, I see no error in the weight given by the officer to the fact that this was an extension of an existing quarry. That again was a matter of planning judgement not law.

82. R (Co-operative Group Limited) v West Lancashire Borough Council and Others [2021] EWHC 507 (Admin), Holgate J said:

> "13. The general principles on judicial review relating to criticisms of an officer's report to a planning committee were summarised by Lindblom LJ in *R (Mansell) v Tunbridge and Malling Borough Council* [2019] PTSR 1452 at [142]. Such a document is not to be read with undue rigour but with reasonable benevolence, bearing in mind that it is addressed to an informed audience with substantial local and background knowledge (see *R (Palmer) v Herefordshire Council* [2017] 1 WLR 411 at [8]). "Background knowledge" includes a working knowledge of the statutory test for the determination of planning applications, referring in that case to the controls on development affecting a listed building. But, by parity of reason, the same principle applies to the test in this case dealing with the application of development control in the Green Belt. It is to be noted that about 90 percent of the defendant's district lies within the Green Belt. There is no dispute between the parties that the members of the Planning Committee would be well experienced in dealing with that policy in the discharge of their duties. In addition, it should be assumed that the members followed the advice they were given in the officer's report in the absence of evidence to the contrary. There was no such evidence in the present case.
>
> 14. A key question for the court in this challenge is whether the officer's report significantly or seriously misled the members. In *R (Heath and Hampstead Society) v Camden London Borough Council* [2007] 2 P & CR 19 at [32] Sullivan J (as he then was) stated:

> "I am mindful of the fact that the report is not to be construed as though it were a statutory instrument. The *dicta* of Hoffmann LJ (as he then was) in *South Somerset District Council v Secretary of State for the Environment* [1993] 1 PLR 80 apply with even greater force to an officer's report to a planning committee …
>
> > 'The inspector is not writing an examination paper on current and draft development plans. The letter must be read in good faith and references to policies must be taken in the context of the general thrust of the inspector's reasoning'."
>
> It is of course, necessary to read not only the passage or passages criticised but the report as a whole."

83. Finally, it is necessary to refer to two authorities on section 31(2A) of the Senior Courts Act 1981. This provides that the High Court must refuse to grant relief on an application for judicial review if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

84. In R (Goring-on-Thames Parish Council) v South Oxfordshire District Council [2018] 1 WLR 5161 the Court of Appeal (Sir Terence Etherton MR, McCombe and Lindblom LJJ) held, at paragraph 47, that the duty imposed by section 31(2A) "has regularly been applied to substantive decision-making across the whole spectrum of administrative action, including in the sphere of planning, both at first instance and in the decisions of this court". The judgment continued:

> "54. As to Mr Streeten's submission that Rafferty L.J. did not grapple with the argument that Cranston J., in performing the duty under section 31(2A), had descended into the planning merits, our conclusion is essentially the same as on the first argument, and for essentially the same reasons.
>
> 55. The mistake in Mr Streeten's submissions here is that, in the context of a challenge to a planning decision, they fail to recognize the nature of the court's duty under section 31(2A). It is axiomatic that, when performing that duty, or, equally, when exercising its discretion as to relief, the court must not cast itself in the role of the planning decision-maker (see the judgment of Lindblom L.J. in *Williams*, at paragraph 72). If, however, the court is to consider whether a particular outcome was "highly likely" not to have been substantially different if the conduct complained of had not occurred, it must necessarily undertake its own objective assessment of the decision-making process, and what its result would have been if the decision-maker had not erred in law."

85. In R (Gathercole) v Suffolk County Council [2021] PTSR 359, Coulson LJ, giving the judgment of the Court of Appeal, held that:

> "38. It is important that a court faced with an application for judicial review does not shirk the obligation imposed by Section 31 (2A). The provision is designed to ensure that, even if there has been some flaw in the decision-making process which might render the decision unlawful, where the other circumstances mean that quashing the decision would be a waste of time and public money (because, even when adjustment was made for the error, it is highly likely that the same decision would be reached), the decision must not be quashed and the application should instead be

rejected. The provision is designed to ensure that the judicial review process remains flexible and realistic.

39. In my view, this case is a good example of the type of situation for which Section 31(2A) was designed. For the reasons set out below, I consider that, if there had been a paragraph in the officer's report flagging the point, explaining that the use of the outdoor areas was subject to all possible noise mitigation measures but that there was a potential residual issue for children with protected characteristics, it would have made absolutely no difference to the planning decision that was taken."

L. DISCUSSION

Ground 1

86. Ground 1 concerns the judgment in Kemnal Manor and paragraph 145 of the NPPF. The claimant says that paragraph 145 contains a closed list of exceptions, which are said to be not inappropriate development in the Green Belt. The claimant contends that it was an error of law to apply the exception of paragraph 145(g) of the NPPF, as the OR did at 7.20 and 7.21. It was therefore wrong to conclude at 7.24 that, "it is not considered that the built element of this application represents inappropriate development and it is therefore not in conflict with policy SP2". At 7.20, the OR expressly considers the exception to inappropriate development, so far as buildings are concerned, concluding that the additional built development falls within the exception in NPPF paragraph 145(g) and that the buildings would not have a greater impact on openness than the existing development (7.21).

87. The claimant says that this is contrary to Kemnal Manor and represents a misunderstanding of Green Belt policy. If the proposal had been assessed as a whole, including the Green Belt development, it would have been necessary to balance the definitional harm against other factors; that is to say, the harm caused by reason of inappropriateness.

88. The claimant also says the OR uses similar reasoning to conclude that the changes in the artificial landform are not inappropriate development (7.24). Changing the landform (moving a hill) is not the construction of new buildings; nor is it built development. Accordingly, the exceptions to inappropriate development in the Green Belt at paragraph 145 are of no application.

89. In these ways, the OR advised that whilst the "very special circumstances" test had to be met, because the operation was for waste and not mineral extraction, the "built" elements of the proposal are not inappropriate; that is to say, the new buildings and the changes in landform. The claimant contends that this misunderstands Green Belt policy.

90. In his oral submissions, Mr Kimblin submitted that the proposal, including the new structures, needs to be considered as a whole. It was, he said, no answer to say that, because of the existing buildings on the site, the changes, in terms of openness, are not material. Section 31(2A) of the 1981 Act cannot be invoked. The decision to grant permission turned on the casting vote of the chair and it therefore cannot be said that, but for the error, the decision would have been highly likely to have been the same.

91. I agree with the defendant and the IP that this ground is not made out. Kemnal Manor is authority for the principle that, in deciding whether development in the Green Belt is inappropriate development, the development must be considered as a whole and not by reference to any part or parts thereof. This is put beyond doubt by Keene LJ's reference at paragraph 34 of his judgment to the curate's egg (which the obsequious cleric described as "good in parts").

92. There is no doubt that the OR did not fall foul of the Kemnal Manor principle. At 6.73 *et seq*, the OR correctly recorded the provisions of paragraphs 143 and 144 of the NPPF. 7.74 correctly applied these paragraphs to the proposed development, concluding that "it is necessary to consider whether very special circumstances exist".

93. At 7.28 of the OR, it was expressly stated that the fact that PFA extraction is not "mineral extraction" meant that the proposed development is "inappropriate" and should not be approved except in very special circumstances. The paragraph ends with an entirely correct recitation of what "very special circumstances" must entail, making express reference not only to potential harm to the Green Belt but to "any other harm resulting from the proposal".

94. The conclusion in the OR on this issue, at 8.8, can hardly have been clearer. All material considerations were taken into account. The benefits of PFA as a secondary aggregate "outweigh the negative aspects associated with the development", such that "very special circumstances exist that outweigh the development being inappropriate in the Green Belt". The final sentence of 8.8, regarding amenity safeguards, makes it plain that all relevant harms were regarded as relevant, including effects on the amenities of local residents in the vicinity of the site, whether by reason of hours of operation, noise, dust emission, visual impact or traffic. We are, here, far removed from the Kemnal Manor principle.

95. This does not, however, dispose of the Ground 1 challenge. Mr Kimblin submits that the discussion and conclusions at 7.20 to 7.25 and 8.6 of the OR as to the built element of the IP's proposals not being inappropriate development mean that the "very special circumstances" test has not been properly applied. In Mr Kimblin's graphic phrase, that part of the development gets a "free go" as against the restrictive Green Belt policy.

96. I do not accept this criticism of the OR. Although the "very special circumstances" requirement means the overall balance remains loaded against inappropriate development in the Green Belt, it made perfect sense for the OR to examine the issue of harm arising from the built element of the proposals, by considering whether - in the light of the buildings etc already on the site (some of which would be demolished) - that element could be said to have "a greater impact on the openness of the Green Belt than the existing development" (7.21). It is clear from the OR - in particular, the passages cited above - that it was not being suggested that the built element was being given a "free go". The overarching question remained whether there were "very special circumstances". However, the ascertainment of whether such circumstances existed could only properly be achieved by understanding the overall nature of the harms. So far as the built element was concerned, its overall impact fell to be assessed in the light of the existing buildings etc. In short, whether the built development, viewed in its own terms, would be inappropriate development in terms of paragraph 145 of the NPPF, was relevant to the overall assessment of whether the "very special circumstances" test was met.

97. The same is true of the local development policies considered in the OR at 7.20 to 7.25, as regards the built element. If that element of the application were found to be contrary to, for example, policy SP2 or SP3, then this would clearly be a relevant consideration in deciding whether the benefits of the development, in promoting the environmentally beneficial use of PFA, constituted "very special circumstances".

98. Ground 1 accordingly fails.

Ground 2

99. Ground 2 also concerns the approach of the OR to the Green Belt. It asserts that the OR failed to recognise that "any other harm" arising from the development could include all harm, including non-Green Belt harm.

100. Mr Kimblin contends that 7.15 to 7.33 of the OR are the substantive paragraphs that deal with the Green Belt. Consideration is given in those paragraphs to Green Belt harm. However, Mr Kimblin says that one looks in vain to see anything in those paragraphs that is about "any other harm", contrary to what is required by paragraph 144 of the NPPF. As a result, despite correct references in these paragraphs to the requirement in paragraph 144 (e.g. at the end of 7.33), the OR is legally flawed.

101. Mr Kimblin says it is not possible to look elsewhere within the OR for an analysis of non-Green Belt harms. He states in terms that the claimant's complaint, in this regard, is about the structure of the OR. A conclusion was reached at 7.33 before the OR had addressed such matters as highways, noise and landscape. The OR is not saved by its conclusion. On the contrary, Mr Kimblin submits that 8.8, which relies on mitigation in its analysis of these other harms, is "absolute nonsense".

102. I do not accept Mr Kimblin's categorisation of 8.8 of the OR. The fact that a particular harm is assessed as being capable of amelioration by reason of a planning condition does not in any way mean that the harm in question is being left out of account; quite the opposite. 8.8 constitutes an express recognition that the harms there mentioned are relevant to the "very special circumstances" assessment.

103. I do not consider that the claimant can derive any material assistance in this regard from paragraphs 32 and 33 of the judgment of Sullivan LJ in Redhill. In the present case, there is nothing to support the suggestion that 8.8 of the OR failed to bring the relevant harms into account.

104. Mr Kimblin's "structural" submission nevertheless merits more detailed consideration. Both the defendant and the IP complain that his submission is unfair to the author (or authors) of the OR and is very far indeed from the benevolent approach adopted by the higher courts to the interpretation of such reports.

105. The defendant and the IP point to the many places in the OR (such as 7.17, 7.28 and 7.33) that make express reference to "any other harm". In the Arsenal case, Cranston J held at paragraph 33 that one should not expect a decision of a planning inspector necessarily to "flow in a linear manor, part by part, paragraph by paragraph, with the conclusion at the end… . The reality is that the decision may have been breached by considering the material as a whole and not by a stage by stage process, each stage considered in isolation".

106. In my respectful view, there is much merit in Cranston J's propositions. As he also said, "a particular part of a decision may be based not only on what comes before it but it may anticipate what follows."

107. It is an inescapable feature of human communication that one cannot say everything at once and that one therefore has to start somewhere.

108. However, there are plainly limits to reliance on any interpretative principle that is based on considering the report as a whole. If, for example, there is a clear contradiction within a report, then the exhortation to read the document in its totality may not necessarily resolve the difficulty. Closer to the claimant's criticism in the present case, there may be a conclusion that is so definite and final as to make it plain that the die has been cast at that point, thereby making it impossible to read any subsequent passages as having a material effect on that conclusion.

109. The OR in the present case is, however, very far from being so categorised. It is not merely at 8.8 that non-Green Belt harms are specifically mentioned. 8.7 is all about highways issues.

110. Mr Kimblin acknowledges that his client's complaint in Ground 2 is to do with the structure of the OR. Without more, structure is, however, a weak peg upon which to hang a challenge to the lawfulness of an officer's report. Given the importance of the openness aspect of the Green Belt policies, it was in my view entirely understandable that the OR should analyse this before addressing the specifics of highways (7.34 to 7.46), local amenity (7.47 to 7.62), landscape and visual aspect (7.63 to 7.74), cultural heritage (7.75 to 7.79), nature of conservation and green infrastructure (7.80 to 7.88), soils and agricultural land use (7.89 to 7.92), water issues (7.93 to 7.99), climate change (7.100 to 7.103), economic impacts (7.104 to 7.109), public access (7.110 to 7.117), landed stability (7.118 to 7.119), restoration and aftercare (7.120 to 7.130), afteruse (7.131 to 7.132) and monitoring and enforcement (7.133 to 7.141). All of these are followed by Part 8 (Conclusion).

111. In fact, far from assisting the claimant, the structure of the OR in my view strongly supports the case made by the defendant and the IP. To regard 7.37 to 7.141 as hermetically sealed off from 7.15 to 7.33 is to ignore the fact that they all feature under the general heading "7.0 Planning considerations", and that the Conclusions Part of the report (8.0) deals, as we have seen, expressly with non-Green Belt issues. It is also to ignore the repeated correct expostulation of the correct test under paragraph 145 of the NPPF.

112. In the face of all this, acceptance of the claimant's challenge under Ground 2 would be a departure from the approach to planning officers' reports that has been repeatedly taken by the courts. It would be bound to have a chilling effect upon the way such reports are hereafter prepared, with no commensurate benefit to the elected Members who must take the ultimate decisions or to the public interest.

113. Ground 2 accordingly fails.

Ground 3

114. Ground 3 is concerned with 6.19 to 6.20 of the OR. In 6.19, reference was made to the "saved" North Yorkshire Waste Local Plan policy 7/3 Re-working of Deposited Waste. Such re-working would be permitted only where the proposal represents the Best Practicable Environmental Option; and re-working would achieve material planning benefits that would outweigh any environmental or other planning harm that might result.

115. At 6.20, the OR observed that, whilst the Best Practicable Environmental Option was national waste policy in 2006, it is not part of the National Planning Policy for Waste (2014). The OR then said "hence, it is not considered that part (a) of this policy can be given any weight in determining this application". Part (d) could, however, be given moderate weight because it was, in effect, consistent with NPPF paragraph 170 paragraph 180.

116. 7.5 of the OR reiterated that "as stated in paragraph 6.20 above, no weight can be given to part (a) of policy 7/3".

117. The claimant considers it to be uncontroversial that regard must be had to a policy that is part of the statutory development plan, if the planning application in question is to be determined in accordance with policies in the development plan, compatibly with section 70(2) of the 1990 Act. The claimant acknowledges that, in this regard, it is open to a decision-maker to decide what weight to give to such a policy, having regard to more up-to-date national policy. The claimant submits that the fact a development plan policy is inconsistent with national policy does not, however, result in a position that "no weight can be given" to the policy. That is said to be incorrect and an error of law. Weight can be given to the policy; and the OR misled the Committee in advising it that no weight could be given to one of the two criteria. The officer and the Committee had a substantial discretion to give such weight as they saw fit to the policy. They were not debarred from giving it any weight.

118. In replying to the submissions of Mr Parkinson and Mr Booth QC, Mr Kimblin said that, insofar as the defence to Ground 3 involved the point that Members decide planning applications, this could not avail the defendant and the IP. The issue was whether the advice in the OR was legally correct or not. The phrase "no weight can be given" at 7.5 was definitive and the defendant and the IP were thus reduced to arguing that "no weight can be given" does not mean what it says. Furthermore, the question was not what the officer(s) who produced the OR thought the phrase meant but what a Member of the Committee might conclude was its meaning. It was fairly obvious that such a Member might well conclude that the first limb of the policy concerning re-use of waste material could not play any part in the decision.

119. It is well-established that the weight to be attached to a planning policy is ultimately a matter of planning judgment; Bloor Homes v SSCLG [2017] PTSR 1283. In exercising that planning judgment, it is open to a decision maker to give a policy no weight.

120. Although Green J's analysis of Green Belt policy was disapproved by Lord Carnwath in Samuel Smith, Green J's findings at paragraph 82 of Timmins are, with respect, plainly right. An officer's report to a planning committee is guidance to that committee "which includes advice and recommendations". In the absence of detailed reasons from the committee itself, the court can, at least *prima facie*, assume that the guidance, advice and recommendations in the report were accepted by the committee and that the same, accordingly, represent the committee's reasons for its decision.

121. Green J went on to observe that the courts "have recognised that the members of Planning Committees are well-versed in the issues that relate to their locality and come to the decision that they are required to take with local knowledge and understanding. They can also, as a collective, be treated as having some experience in planning matters …". This led Green J to hold that it "is not therefore to be assumed that every infelicity of language or expression by the Officer or every mis-description of the relevant test will necessarily have exerted any material impact upon the Committee even in respect of reports that are accepted by the committee." He concluded:

> "To conclude otherwise would mean that even if the decision of the members was taken in an altogether impeccable manner with experienced members directing themselves perfectly, their decision would nonetheless be at risk of being quashed because the Officers report contained infelicities or ambiguities which the Committee had recognised and ignored".

122. In Mansell, Lindblom LJ held at paragraph 42(2) that officers' reports "are not to be read with undue rigour" but, rather, "with reasonable benevolence". Furthermore, it must be borne in mind that such reports are "written for councillors with local knowledge". He concluded:

> "The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is if the advice in the officer's report is such as to misdirect the members in a material way - so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice".

123. As Lindblom LJ said at paragraph 42(3), where the line is drawn will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. At one end of the spectrum would be "cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact" or where they have "plainly misdirected the members as to the meaning of a relevant policy". At the other end are cases "where the officer has simply failed to deal with the matter on which the committee ought to receive explicit advice". The touchstone is whether "there is some distinct and material defect in the officer's advice". If not, "the court will not interfere".

124. Most recently, Holgate J in Co-operative Group Limited held (at paragraph 13) that "the background knowledge" of a planning committee "includes a working knowledge of the statutory test for the determination of planning applications …". At paragraph 14, Holgate J described the touchstone as "whether the officer's report significantly or seriously misled the members".

125. Despite Mr Kimblin's skilful submissions, I am in no doubt that Ground 3 cannot be made good. Members of a planning committee can be expected to be aware of the fact that an officer's report is a recommendation to the committee. As a planning professional, the officer gives the committee his or her considered view of the matters bearing for and against the grant of permission. In order to reach a recommendation, the officer must inevitably form their own a view on the weight (if any) to be given to planning policies. Having provided his or her reasoning, it is perfectly permissible for

the officer to express the view that, in the light of that reasoning, he or she has decided that no weight "can be given" to the policy concerned.

126. That is precisely what happened in the present case. The OR gave a perfectly sustainable reason why no weight was to be given to the principle of Best Practicable Environmental Option. In the circumstances of this case, it is entirely fanciful to conclude that the Members of the Committee were being told anything other than that this was the view of the professionally-qualified officer charged with making the overall recommendation to the Committee. The OR was not telling them anything which was factually or legally incorrect.

127. In essence, Ground 3 rests on the proposition that, instead of writing "can be given any weight" in 6.20 and "no weight can be given" in 7.5, the OR should have written "should not be given any weight" and "no weight should be given", respectively. Again, I find that to accede to this proposition would be to depart significantly from the established case law on the proper interpretation of officer's reports.

128. My conclusions on this issue are reinforced by the fact that, at 6.20, the full phrase is "it is not considered that Part (a) of this policy can be given any weight…" (my emphasis). That is unquestionably the language of someone expressing their own professional judgment, which is being offered as such to the Committee. Although the word "considered" does not occur at 7.5, that paragraph refers expressly back to 6.20.

129. Ground 3 accordingly fails.

Ground 4

130. Ground 4 contends that Policy 7/3 raises the issue of alternatives, in that it requires the assessment of Best Practicable Environmental Option. The alternatives to excavation of restored land, very long-term visual and amenity effects, means of transporting the mineral other than by road, and a range of Green Belt effects are said not to have been considered or assessed, as to whether they comprise the Best Practicable Environmental Option, contrary to the policy requirement in 7/3(a).

131. Given that, as I have found, the OR was entitled to conclude that, in the circumstances, no weight fell to be attached to the BPEO element of Policy 7/3, Ground 4 largely falls away. Insofar as Ground 4 can be said to involve a criticism of the fact that the OR did not consider alternatives, the defendant and the IP rightly point out that alternative proposals only fall to be considered in "exceptional circumstances": R (Mount Cook Land Ltd) v Westminster CC [2003] EWCA Civ 1346. Given the nature of the development in the present case, it was plainly rational for the OR not to have regard to any particular alternative. This is especially the case, since no such alternative was raised by the claimant, with the exception of suggesting that alternatives might be explored to transporting the PFA from the site by road. This suggestion was, however, analysed in detail at 7.41 and 7.42 of the OR.

132. Ground 4 accordingly fails.

Ground 5

133. Ground 5 asserts that the OR failed to make a lawful determination against the development plan. At 8.3 of the OR, item 2 concerned the emerging Minerals Waste Joint Plan Policies D02, D06, D09, D10, D11 and D12. At 8.3(1), (3) and (4), however, specific extant local plans were identified. This means, the claimant asserts, that the OR conflated the development plan policies and those in the emerging joint plan. Mr Kimblin submits that this misled Members of the Committee as to what the development plan is. It is, however, essential to know what the development plan is. The IP's proposal fell to be assessed against the development plan. The emerging plan is a matter to which the statutory requirements in section 70(2(a) of the 1990 Act and section 38(6) of the 2004 Act do not apply.

134. In his final submissions, Mr Kimblin sought to characterise the approach of the defendant to this and certain of the other grounds as being, on the one hand, that minor errors in the OR are of no consequence and can be ignored; whereas, on the other hand, major errors, such as that in 8.3, can also be ignored because they are so obvious that no Member of the Committee would be misled by them. Thus, both minor and major errors can be waived aside. That, Mr Kimblin says, cannot be right.

135. I have some sympathy with this view. Although the higher courts have explained how, in the case of a specialist tribunal, that tribunal can be expected to have got the law in its specialist area right, even though the tribunal has articulated a proposition to the apparent opposite effect in its decision (see eg. Secretary of State for the Home Department v AH Sudan) and Ors [2007] UKHL 49), the case law on the proper approach to planning officers' reports does not go so far. This is unsurprising, given that, despite their knowledge of the legal framework, the members of planning committees are not specialist judges.

136. In my view, however, the error at 8.3 of the OR is not a major one. As both the defendant and the IP point out, 6.1 and 6.2 set out, in entirely accurate terms, what the "*Development Plan*" comprised for the purposes of the application. There is, here, no mention of emerging plans. At 6.3, emerging local policies are specifically mentioned as things to which weight "may also be afforded". The Minerals and Waste Joint Plan is specifically referenced as such an emerging policy.

137. At 8.1, under the heading "Conclusion", the OR says that "the starting position for the determination of this planning application must be the *Development Plan*." Members are told that their "decision must be made in accordance with the extant policies of that plan, unless there are material considerations …".

138. 8.2 then refers to a range of policies in the "*Development Plan*" to which due regard must be had as well as a number of other material considerations.

139. It will be seen that the OR is careful to use "*Development Plan"* as a defined expression (in italics). Although 8.3(2) places the emerging Minerals and Waste Joint Plan within a list that otherwise comprises extant plans, the opening words of 8.3 refer the reader back to "the considerations set out in Section 7.0 above". At 7.1, we see the statement that section 38(6) of Planning and Compulsory Purchase Act 2004 "requires that all planning authorities must determine each planning application in accordance with planning policies that comprise the *Development Plan* unless material considerations indicate otherwise".

140. It is, accordingly, evident that the reference to the emerging plan at 8.3(2) is merely infelicitous. It is in no sense to be described as a major or otherwise material error. Members reading the OR can have been in no doubt as to what the development plan meant.

141. Mr Kimblin suggests that because 8.3 is part of the conclusion section of the OR, there was at least a danger that Members had read only the conclusion section. I am not prepared to make such an assumption. As a general matter, this court will proceed on the basis that the relevant information and recommendations to the Members of a planning committee are those contained in the entirety of the report; and that Members took their decision by reference to the report in its entirety. There would need to be clear and cogent evidence that this was not the position, in order for this assumption to be displaced.

142. In the present case, no such evidence exists. In fact, the draft minutes of the Committee meeting record Members as having "welcomed the comprehensive report and presentation". Immediately thereafter, we find reference being made by a Member to the emerging Minerals and Waste Joint Plan. The minutes then state: "In response it was emphasised that the joint plan had yet to be agreed, and the policies could be subject to change …". The status of the emerging plan was, therefore, in any event made plain to the Committee.

143. Ground 5 accordingly fails.

Ground 6

144. Ground 6 concerns policy SP13 (scale and distribution of economic growth) of the Selby District Core Strategy Local Plan. I have set out SP13 at paragraph 25 above.

145. Ground 6 emphasises part D of SP13, which provides that in all cases development should be sustainable and be appropriate in scale and type to its location, not harm the character of the area, and seek a good standard of amenity. At 7.66 of the OR, reference was made to the defendant's Principal Landscape Architect still considering, as at February 2020, that it was likely the development would have significant adverse landscape effects which, unless residual adverse effects were sufficiently mitigated, offset and reduced, were likely to be contrary to the landscape policy. Reference was then made to the gradual reduction in height of Stage II over 17 to 20 years, with soil replacement beginning in Phase 5. 7.66 concluded: "It is considered that the temporary negative impact on the localised character of the area during the significant period until restoration is complete means that the development as proposed is contrary to policy SP13".

146. The claimant contrasts that finding with what is said at 7.74 of the OR. As I have mentioned at paragraph 49 above, 7.74 was the subject of a Supplementary Report, correcting errors in the original version. As corrected, the thrust of 7.74 is that, given the duration of the proposed landscape change, relative to the site being restored under the terms of a revised landscaping and restoration scheme, it was considered that the proposal is capable of being designed with landscaping and screening to effectively mitigate its impacts, subject to the control of the development by means of planning conditions and the terms of a section 106 Agreement. All this meant that, in terms of the landscaping issues, the development was said to be compliant with policy SP13.

147. Ground 6 asserts that, in assessing compliance with the development plan, the OR failed to take into account the fact that the proposal did not comply with policy SP13. Not only do the conclusions of the OR state that there is compliance with SP13; the claimant says they wholly failed to mention that landscape effects were significant and adverse; and were contrary to landscape policy. The OR should, therefore, have said that the development is contrary to policy SP13.

148. I do not find that the claimant's criticisms are well-founded. Policy SP13 provides that support will be given to developing and revitalising the local economy in all areas by a number of specified means. In rural areas, those include sustainable development that brings sustainable economic growth including, for example, the redevelopment of existing and former employment sites. It is in that context that part D needs to be understood.

149. We have seen at paragraphs 56 and 57 above that the defendant's Principal Landscape Architect was, by 10 February 2020, not objecting to the application, subject to appropriate mitigation being resolved and secured. As can be seen from 7.66, it was the "temporary negative impact … during the significant period until restoration is complete" which meant that "the development as proposed is contrary to policy SP13". As is evident from what follows in the OR, however, in particular at 7.69 to 7.74, by the time of the recommendation to the Committee, the view had been taken that, having regard to the terms of the proposed section 106 Agreement and the powers of control exercisable through conditions attached to the grant pf permission, the proposed development accorded with policy SP13. Again, this was a matter of planning judgement for those responsible for producing the OR. So too is the content of 7.109, which gave further reasons why the proposed development would not be contrary to part D of policy SP13. Ground 6 is not framed as a rationality challenge but, in any event, I can detect no irrationality or other public law error in the conclusion that, overall, there was no failure to comply with policy SP13.

150. I also note that in the draft minutes, a Member is recorded as saying that the defendant's Principal Landscape Architect had raised concerns regarding the application and had asked for mitigation measures to be introduced on Whitefield Lane in view of the increase of HGVs proposal on that route. The Member wondered whether that issue had been addressed. The draft minutes record: "In response it was noted that the mitigation referred to had been addressed in the report that the landscape architect had not objected to the report".

151. In the Notice of Decision, conditions 31 to 37 relate to the restoration of the site. In particular, provision is made for an Interim Restoration Plan, in order to "ensure the progressive effective landscaping and restoration of the site". This condition, I am satisfied, addresses the concerns of the Principal Landscape Architect.

152. Ground six accordingly fails.

Section 31(2A)

153. I have not found it necessary to have recourse to section 31(2A) in order to reject Grounds 1 to 5. If, however, I had come to the conclusion that the errors complained of in any or all of those grounds were made out, I am fully satisfied that they could have been addressed by minor changes to the OR. If those changes had been made, I am entirely

satisfied that it is highly likely that the result would have been the same. In so saying, I am conscious of the fact that the application was granted only on the casting vote of the Chair. Any such changes to the OR would not, however, have altered the views of Members, one way or the other.

M. DECISION

154. The judicial review is dismissed.