IN THE HIGH COURT OF JUSTICE **CO/ /2016**
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT (PLANNING COURT)

BETWEEN:

LECKHAMPTON GREEN LAND ACTION GROUP LIMITED

Claimant

-v-

TEWKESBURY BOROUGH COUNCIL

Defendant

-and-

(1) REDROW HOMES LIMITED

-and-

(2) MARTIN DAWN (LECKHAMPTON) LIMITED

Interested Parties

STATEMENT OF FACTS AND GROUNDS

Introduction

1. This is the statement of facts and grounds of judicial review on behalf of the Claimant in this matter. The Claimant seeks a declaration and the quashing of the grant of planning permission by the Defendant to the 1st Interested Party for the erection of 377 dwellings, including access and associated infrastructure on land to the west of Farm Lane, Shurdington, Gloucestershire ("the Decision"). Title to the land is vested in the 1st Interested Party, and the 2nd Interested Party has a charge over the land under a legal mortgage.

2. The Decision is contained within a decision notice dated 26 April 2016 under reference "14/00838/FUL".[1]

3. The Claimant represents approximately 1100 residents living close to the application site, and took an active part in the determination of the planning application, making a number of representations to the Defendant planning authority.

4. The Claimant contends that the Decision was unlawful for a number of reasons, and seeks permission to bring judicial review proceedings in respect of that Decision.

5. The Claimant further seeks judicial review of the Decision and respectfully asks the Honourable Court to make a declaration as to the illegality of the decision to grant and the planning permission and to quash the permission contained in the decision notice dated 26 April 2016; and further remit planning application reference 14/00838/FUL to the Defendant to determine in light of the judgment of the Court.

Factual Background

6. The application site comprises some 15 hectares of land lying on the southern fringe of Cheltenham in the vicinity of the village of Leckhampton and north-east of the village of Shurdington.

7. The application site forms the western part of a larger site being jointly promoted as a housing allocation in the Cheltenham, Gloucester & Tewkesbury Joint Core Strategy ("the JCS"). That is known as the "South Cheltenham Urban Extension" contained within emerging JCS policy SA1 and also covers within the administrative boundary of Cheltenham Borough Council. It is also known as the "A6 Allocation". The JCS was at the time of

[1] Tab D/659-665

consideration by the Defendant's planning committee, at the time of resolution and is presently, before an Inspector appointed by the Secretary of State to determine its soundness: Inspector Elizabeth Ord. The Claimant has taken an active role in resisting the allocation and has appeared at the hearing sessions convened by Inspector Ord.

8. The site also lies within the setting of a number of Grade II listed buildings: Leckhampton Farmhoue, its barn and Brizen Farmhouse.

9. The application was validated on 10 October 2014 and was accompanied by an Environmental Statement dated August 2014 because the scheme amounted to "EIA Development" within paragraph 10b to Schedule 2 Town and Country Planning (Environment Impact Assessment) Regulations 2011. The Environmental Statement dealt with a number of matters, including some cumulative effects, it did not however, assess the entire South Cheltenham Urban Extension as a single urban development project to the same degree of analysis.[2]

10. On 13 September 2013 a planning application had been submitted to Cheltenham Borough Council concerning land on the eastern side of the urban allocation and sought permission for the broad remainder of the JCS South Cheltenham Urban Extension allocation, namely: 650 dwellings, a mixed use local centre, a local convenience store, retail units, potential further space for a pharmacy, GP surgery, dentist practice, children's' nursery, primary school, strategic open land and allotments. That was refused by a decision notice dated 31 July 2014 and an appeal dismissed by the Secretary of State on 5 May 2016[3]. The Claimant was a "Rule 6" party in that inquiry. It was represented by counsel and called its own expert witness.

11. The application was tabled before the Defendant's planning committee on 29 September 2015. Members were assisted in determining the 1st Interested

[2] Tab D/1-398
[3] Tab D/668-673

Party's planning application by an Officer's Report.[4] The crux of the Officer's reasoning on the controversial matters is summarised in the concluding paragraphs under the heading "overall balancing exercise",[5] together with a number of other references in the report which advises Members that:

a. The site falls within the emerging allocation being in the JCS to meet the Borough's housing needs [OR, 18.1]
b. The planning application was suitably master-planned to deliver the wider allocation [OR, 18.3]
c. The Claimant's local green space proposal stood little prospect of success as it covered an existing residential site allocation in the emerging plan [OR, 19.4]
d. The development would cause "less than substantial" harm to the setting of three listed buildings [OR, 16.4]
e. The adverse effects did not significantly and demonstrably outweigh the benefits.

12. The Defendant made a minute of the meeting,[6] which records that Members resolved that the Council should grant planning permission subject to the Applicant entering into a legal agreement pursuant to s.106 Town and Country Planning Act 1990, and delegated authority to the Council's Development Manager to:

> *"PERMIT the application, subject to the formal comments from County Highways, and required highway conditions/contributions, and the completion of negotiations from a Section 106 Agreement to secure the required infrastructure for the development and to ensure that the delivery of the wider strategic allocation was not prejudiced, in accordance with the Officer recommendation."*

13. By late 2015 however the Defendant had not issued planning permission. On 16 December 2015 Inspector Ord published a document entitled "Inspector's Preliminary Findings on Green Belt Release, Spatial Strategy and Strategic

[4] Tab D/472-505
[5] Tab D/492-493
[6] Tab D/506-546

Allocations" concerning the soundness of the JCS.[7] It was published on the examination library under reference EXAM146. Inspector Ord made a number of important findings with respect to the application site, which formed a part of the strategic allocation referred to within her note as "the Leckhampton Site". The pertinent findings are as follows:

> The Inspector expressed her "reservations" about developing the site within Tewkesbury's boundaries (broadly the application site) [IR,57]:
>
> *"I have reservations about developing this area of high landscape and visual sensitivity, adjacent to the AONB and GB."*[8]
>
> The Inspector found the Tewkesbury side of the allocation to be not "sound" at [IR,60]:
>
> *"On the other hand, for reasons of landscape sensitivity, I am not minded to find the Tewkesbury part of the allocation sound."*[9]
>
> The proposed local green space ("LGS") designation would be "sound" at [IR,66]:
>
> *"In my judgement, the evidence suggests that the NPPF criteria are met and LGS designation is justified."*[10]

14. In-spite of that interim report and the Defendant responding within the JCS examination to that interim report, the Defendant did not refer the matter back to its planning committee, and on 26 April 2016 issued planning permission[11].

15. After the issue of planning permission, and having considered further evidence, Inspector Ord delivered an Interim Report dated 26 May 2016.[12] The relevant sections are IR, 112- 125.

[7] Tab D/564-590
[8] Tab D/574
[9] *ibid*
[10] Tab D/575
[11] Tab D/659-665

16. Whilst post-dating the Decision, and not of course determinative of its legality, Inspector Ord's further findings do place beyond doubt the meaning of her Preliminary Findings Report and the likely bearing it would have had on Members had it been placed before them. Inspector Ord concluded as follows:

> *112. In my Preliminary Findings. I indicated that I was not minded to find the Tewkesbury side of the Leckhampton allocation, West of Farm Lane, sound and that overall, built development should avoid areas of high landscape and visual sensitivity. Having considered additional evidence submitted since then, including Redrow's planning application documents relating to Land West of Farm Lane107, I remain of this view."*
>
> *115. Tewkesbury Borough Council has granted planning permission for the West of Farm Lane site and the developers are ready to proceed. Whilst it was suggested at the March hearing that this part of the allocation could be retained for pragmatic integration reasons, in my judgement, this is inappropriate. The permission is now being challenged by residents and a letter before claim has been issued. Consequently, the permission could be overturned. Given my finding of unsoundness and the uncertainty surrounding the site, I recommend that it be removed from the allocation and the urban extension boundaries be accordingly redrawn.*
>
> *123. Overall, in my judgement, a limited amount of development could be supported towards the north of the site where public transport is more accessible, subject to the avoidance of land of high landscape and visual sensitivity. Therefore, for reasons of landscape/visual amenity and highway impacts, I recommend that the Cheltenham part of the site be allocated for a modest level of built development in the order of 200 dwellings.*
>
> *124. ... It is, therefore, my recommendation that the Leckhampton urban extension be removed in its entirety from the JCS."*

17. The Claimant sent a pre-action protocol letter to the Defendant dated 12 May 2016 and to the 1st and 2nd Interested Parties[13]. The Defendant responded by a letter of response dated 27 May 2016[14].

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[12] Tab D/770-812
[13] Tab C/1 - 10
[14] Tab C/16 - 19

Legal Framework

(i) Obligation to take into account "the Environmental Information"

18. The Defendant was obliged to take into account "the environmental information" prior to granting consent, by Regulation 3(4) EIA Regulations[15]. The "environmental information" is defined as "the environmental statement", and that in turn is defined by Reg.2(1) EIA Regulations as:

> *"... such of the information referred to in Part 1 of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but…*
>
> *... at least the information referred to in Part 2 of Schedule 4"*

19. Within the mandatory Part 2 requirements, the Environmental Statement had to include *"the data required to identify and assess the main effects which the development is likely to have on the environment"* and *"a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects"*.

20. The EIA Regulations transpose into domestic legislation the provisions of Environmental Impact Assessment Directive 2011/92/EU ("the EIA Directive"). Article 2(1) provides as follows:

> *"1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. Those projects are defined in Article 4"*

[15] Tab E/3

21. As the European Court of Justice held those provisions in Case C-142/07 *Ecologistas en Acción-CODA v Ayuntamiento de Madrid* [2009] ECR I-6097 at [44]:

> *"... the purpose of the amended [EIA] directive cannot be circumvented by the splitting of projects and the failure to take account of the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the amended directive ..."*

22. The scope of the assessment of that assessment was most recently summarized by Lang J in *Larkfleet Ltd v South Kesteven DC* [2014] EWHC 3760 (Admin.) at [54(ii)] (approved by Richards LJ on appeal [2015] EWCA Civ. 887 at [52]):

> *"... the starting point will always be the proposed development. However, the planning authority ought also to go on to consider whether there are other proposed developments in the vicinity and if so, whether they should be assessed jointly with the proposed development, as if they comprised a single Schedule 2 development. The test is whether they ought to be regarded "as part of the same substantial development" (per Davis LJ in Burridge[16]) or whether the proposed development is "an integral part of an inevitably more substantial development" (per Simon Brown J. in Swale[17]).*"

23. Whether the Defendant issued planning permission in breach of its obligation at Reg.3(4) EIA Regulations is a straightforward question of law: *Burridge v Breckland DC* [2013] EWCA Civ. 228. Furthermore, whilst Richards LJ expressed the view in *Larkfleet* that a *Wednesbury* standard might be appropriate at [44], his Lordship expressly did not decide the point, and approached the question as one of law for the Court, posing the question for resolution at [37]:

> *"... it is legitimate for different development proposals to be brought forward at different times, even though they may have a degree of interaction, if they are different 'projects'."*

[16] *Burridge v Breckland DC* [2013] EWCA Civ. 228.
[17] *R v Swale Borough Council ex p. RSPB* [1991] PLR 6.

His Lordship concluded at [44] that:

> *"I am of the view that the link road proposal is a "project" for EIA purposes which is distinct from the proposed development of the residential site."*

24. Furthermore, in *Bowen-West v SSCLG* [2012] EWCA Civ. 321 Laws LJ grappled with the question as one of law as well as a *Wednesbury* standard, at [38]:

> *"38 Thus I would not merely acquit the Secretary of State of a Wednesbury error. I consider, so far as the facts of the matter appear to me, that his conclusion was correct."*

Accordingly, his Lordship declined to refer the question of the standard of review to the CJEU for determination at [45].

25. The question is one of lawful scope of the assessment, as distinct from the ultimate evaluative assessment made by the decision-taker on the significant effects arising from a project, the scope of which has been properly delineated per Ecologistas. The former is a question of law the latter one of judgment.

(ii) Failure to take into account material considerations

26. By s.70(2) Town and Country Planning Act 1990 the decision taker is required to have regard to *"any other material consideration".*[18]

27. In *R(Kides) v South Cambridgeshire DC* [2002] 1 P & CR 19 Jonathan Parker LJ held at [126] that:

> *"In practical terms ... where since the passing of the resolution some new factor has arisen of which the delegated officer is aware, and which might rationally be regarded as a "material consideration" for the purposes of section 70(2) , it must be a counsel of prudence for the*

[18] Tab E/1

delegated officer to err on the side of caution and refer the application back to the authority for specific reconsideration in the light of that new factor. In such circumstances the delegated officer can only safely proceed to issue the decision notice if he is satisfied (a) that the authority is aware of the new factor, (b) that it has considered it with the application in mind, and (c) that on a reconsideration the authority would reach (not might reach) the same decision."

28. Jonathan Parker LJ held at [121] that *"material"* in this context meant a factor that *"when placed in the decision-maker's scales, would tip the balance to some extent, one way or the other",* and that "has some weight in the decision-making process, although plainly it may not be determinative".

29. The Defendant's apparent suggestion in pre-action correspondence that subsequent case law has altered the Kides test to *"the need to consider whether the new factor would in reality have made any difference to the decision"* is wrong and runs entirely contrary to the explicit dicta in Kides.

30. Notwithstanding what Carnwath LJ held in *R(Dry) v West Oxfordshire District Council* [2010] EWCA Civ. 1143 at [16] that *Kides* should be *"applied with common sense"*, Pitchford LJ cautioned in *R(Hinds) v Blackpool Borough Council* [2012] EWCA Civ. 466 at [35] that:

> *"35 Carnwath LJ pointed out at paragraph 16 of his judgment in R (Dry) v West Oxfordshire DC and Taylor Wimpey [2010] EWCA Civ 1143 that Jonathan Parker LJ was seeking in paragraph 126 only to give guidance as to the cautious approach to be taken by the officer and that the guidance should be applied should be applied with common sense. It is important, in my view, to appreciate that the court in Dry was not offering a route by which to avoid the requirements of s.70(2) ."*

31. Lindblom J. summarised the law in *R(Wakil t/a Orya Textiles) v Hammersmith & Fulham LBC* [2014] EWHC 2833 (Admin.) at [94]:

> *"94 The law relevant to this ground is clear. The jurisprudence is to be found in the decisions of the Court of Appeal in Kides, R. (on the application of Dry) v West Oxfordshire District Council [2010] EWCA Civ 1143 and R. (on the application of Hinds) v Blackpool Borough Council [2012] EWCA Civ 466 . When a grant of planning permission is challenged on the ground that the local planning authority, having resolved to approve the development proposed, ought to reconsider*

that decision, the court will have to consider whether the new factor relied upon in the challenge would have been capable of affecting the outcome. What is required therefore is not merely some obvious change in circumstances but a change that might have had a material effect on the authority's deliberations had it occurred before the decision was made. The crucial question for the court to consider is whether the new factor might have led the authority to reach a different decision."

(iii) Section 66(1) Planning (Listed Buildings and Conservation Areas) Act 1990

32. Section 66(1) Planning (Listed Buildings and Conservation Areas) Act 1990 provides as follows:

> *(1) In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.*[19]

33. In *East Northamptonshire District Council v SSCLG* [2014] EWCA Civ. 137. Sullivan LJ (with whom Maurice-Kay and Rafferty LJJ agreed) held at [22]-[23] that:

> *"22 .... In the present case the Inspector had expressly carried out the balancing exercise, and decided that the advantages of the proposed wind farm outweighed the less than substantial harm to the setting of the heritage assets. ... I accept that (subject to grounds 2 and 3, see [29] et seq below) the Inspector's assessment of the degree of harm to the setting of the listed building was a matter for his planning judgment, but I do not accept that he was then free to give that harm such weight as he chose when carrying out the balancing exercise. In my view, Glidewell L.J.'s judgment is authority for the proposition that a finding of harm to the setting of a listed building is a consideration to which the decision-maker must give "considerable importance and*

[19] Tab E/2

weight..”

“23 That conclusion is reinforced by the passage in the speech of Lord Bridge in South Lakeland to which I have referred ([20] above). It is true … that the ratio of that decision is that "preserve" means “do no harm”. However, Lord Bridge’s explanation of the statutory purpose is highly persuasive, and his observation that there will be a ‘strong presumption’ against granting permission for development that would harm the character or appearance of a conservation area is consistent with Glidewell L.J.’s conclusion in Bath. There is a ‘strong presumption’ against granting planning permission for development which would harm the character or appearance of a conservation area precisely because the desirability of preserving the character or appearance of the area is a consideration of ‘considerable importance and weight.”

34. The duty was considered again following of the Court of Appeal’s judgment in in *R(Field Forge Society) v Sevenoaks District Council* [2014] EWHC 1895 (Admin.) at [48]-[49]. In particular, when considering the statutory presumption, Lindblom J. held at [49] that:

“… a finding of harm to the setting of a listed building or to a conservation area gives rise to a strong presumption against planning permission being granted. The presumption is a statutory one. It is not irrebuttable. It can be outweighed by material considerations powerful enough to do so. But an authority can only properly strike the balance between harm to a heritage asset on the one hand and planning benefits on the other if it is conscious of the statutory presumption in favour of preservation and if it demonstrably applies that presumption to the proposal it is considering.”

35. In Jones *v Mordue* [2015] EWCA Civ. 1243 however, Sales LJ at [26]-[27] clarified the scope of *East Northamptonshire* as a requirement to supply reasons only to dispel a contrary impression that the decision taker had not afforded considerable importance and weight to the statutory duty in the planning balance.

36. Thus as Kerr J. held recently in R (Blackpool Borough Council) v SSCLG [2016] EWHC 1059 (Admin.) at [54] a decision taker will still err if they:

> *"54 ... [regarded] the harm to the significance of the [heritage asset] as relatively slight and, because it was relatively slight, ... [decide] that the weight to be given to that harm should also be relatively slight."*

(iv) Treatment of heritage assets on application of the presumption at paragraph 14 NPPF

37. The Claimant accepts that, in the absence of a five-year housing land supply and any other material considerations, notwithstanding Inspector Ord's cross-examination of the Defendant's officers at an Examination in Public session on 6 April concerning to which district housing supply would be added, the Defendant was obliged to follow the policy presumption at paragraph 14 NPPF which provides as follows[20]:

> *"At the heart of the National Planning Policy Framework is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan-making and decision-taking.*
>
> *For decision-taking this means:*
>
> *● approving development proposals that accord with the development plan without delay; and*
>
> *● where the development plan is absent, silent or relevant policies are out of date, granting permission unless:*
>
> > *— any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or*
> >
> > *— specific policies in this Framework indicate development should be restricted."*

[20] Tab E/4

38. Paragraph 14 is subject to a footnote, footnote 9, which provides a non-exhaustive list of "specific policies" which indicate development should be restricted, it reads as follows:

> *"For example, those policies relating to sites protected under the Birds and Habitats Directives (see paragraph 119) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, Heritage Coast or within a National Park (or the Broads Authority); designated heritage assets; and locations at risk of flooding or coastal erosion."*

39. The operation of the presumption in favour of planning permission at paragraph 14 and the interaction with heritage assets was examined in *Forest of Dean DC v SSCLG* [2016] EWHC 421 (Admin.). Coulson J. held at [47]:

> *"The last bullet point in paragraph 14 meant that the presumption in favour of planning permission was to be dis-applied in two separate situations. Both Limbs had to be considered. In this case, because of the harm to the designated heritage assets, Limb 2 fell to be considered first. The appropriate test was the ordinary (unweighted) balancing exercise envisaged by the words in paragraph 134. Nowhere did the inspector carry out that exercise. He only undertook the weighted exercise in Limb 1. He therefore erred in law."*

(v) Approach to the Officer's Report to Committee and decision taking.

40. It is well established that where members have voted in accordance with their officer's recommendation, it can be reasonably inferred that, absent reasons to the contrary, they voted for the reasons set out within the officer's report: *R (Siraj) v Kirklees Metropolitan Council* [2010] EWCA Civ. 1286 per Sullivan LJ at [16]-[17].

41. In *R v Selby DC ex p. Oxton Farms* [1997] EG 60 Judge LJ held the standard for impugning and Officer's Report to be where:

> *"... the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken."*

Grounds of judicial review

42. The Claimant contends the grant of planning permission was unlawful for the following reasons:

    a. The Defendant failed to take into account all the required environmental information of the project, being the significant environmental effects of the South Cheltenham Urban Extension allocation, contrary to Reg.3 EIA Regulations[21].

    b. The Defendant failed to have regard to a material consideration prior to issuing permission contrary to s.70(2) Town and Country Planning Act 1990 including by its planning committee failing to consider whether planning permission should still granted in the light of the new consideration[22].

    c. The Defendant's Officer's Report misled Members as to the approach and place of harm to heritage assets in the planning balance, contrary to s.66(1) Planning (Listed Buildings and Conservation Areas) Act 1990[23] and a proper understanding of the NPPF heritage policy[24].

Ground 1 – Failure to take into account "the environmental information"

43. At the time of the submission of the 1st Interested Party's planning application, a planning application had already been submitted for the adjoining part of the site forming the allocation.

[21] Tab E/3
[22] Tab E/1
[23] Tab E/2
[24] Tab E/4

44. An Environmental Statement was submitted on behalf of the Applicant ("the ES"). Within Chapter 5 of the ES, headed "setting the development parameters" which explains at paragraph 5.1.1. that[25]:

> *"The Environmental Statement examines the plans and the associated description of development. The plans identify the extent of proposed built development and the component parts being tested".*

45. The Chapter goes on to make clear the principle focus of assessment is the planning application submitted by the 1st Interested Party. However, at Chapter 19 the 1st Interested Party has assessed the cumulative effects of the scheme and identified the planning application forms a part of a larger emerging site allocation[26]. Whilst there is a summary evaluation of the likely adverse effects it is clear the application was not assessed with the rest of the South Cheltenham Urban Extension (emerging JCS policy SA1) as a single urban development project. It is plain that omission has resulted in significantly less environmental information being provided to the decision taker about the effects of the project as a whole than would be the case had it been so assessed, for example:

    a. A full Landscape and Visual Impact Assessment ("LVIA") was undertaken for the application site[27]. That assessment analysed, in accordance with Guidelines for Landscape and Visual Impact Assessment ("GVLIA 3"), the significance of impact by reference to defined criteria. The results of the LVIA are summarised within Chapter 9 of the ES. That is to be compared to a light touch assessment is undertaken of the landscape and visual effects of the entire allocation examining only potential for "combined or simultaneous visibility", "potential successive viewpoints" and "potential sequential visibility" without the detailed of analysis undertaken for the application site.

[25] Tab D/28
[26] Tab D/372-382
[27] Tab D/78-128

b. The ecology and nature conservation effects of developing the application site are set out at Chapter 11[28]. The ecological survey undertaken in March 2014 only considered the application site. The ES relies upon a survey undertaken in 2012 to support an outline planning application for a neighbouring site, which is said to also consider the application site. The results or detail of that survey are however not explained within the ES, and certainly no assessment of the like done of the application site is set out within the ES for the broader A6 allocation, such as would justify the conclusion in Chapter 19 that the nature conservation effects would be "negligible"[29].

c. The impacts on Leckhampton Farmhouse, the barn and Brizen Farmhouse are set out within Chapter 14[30]. Within Chapter 19 it is simply asserted that the full allocation would have no greater than "moderate adverse" significance on heritage assets. However, Inspector Ord records within her interim report on the JCS (IR,53) a number of other heritage assets, including Church Farm, the Rectory, the Olde England Cottage and the Moat Cottage affected by the A6 allocation. None of which are mentioned within the cumulative impact section of the ES, but yet the evidence base before the JCS Inspector recorded *"there are major heritage concerns to development"*. Whilst, the Defendant, prays-in-aid the supplementary "Built Heritage Assessment" updated in May 2015, it again only assesses impact by reference to the application scheme, not the wider allocation. Such is made clear at para.6.5[31]:

"Olde England, Moat Cottage, Church Farmhouse, Church of St Peter, and The Rectory

As has been covered previously, the application site makes an overall negligible contribution to the significance of these listed buildings.

[28] Tab D/168-209
[29] Tab D/379
[30] Tab D/245-270
[31] Tab D/430

Other than views of the spire of the Church of St Peter from the north-west part of the application site, there is no intervisibility between the site and any of these assets. Nevertheless, the site does lie within their wider setting, but given the distance between them, the separation provided by planting, fields, development and Farm Lane, it is considered that their significance and settings will suffer no harm or negligible harm resulting from the proposed development."

46. A fair reading of the treatment of the issue of "master-planning" in the officer's report to Committee reveals that the planning application was being considered (indeed justified) as a smaller part of a larger, single urban development project, namely the emerging South Cheltenham Urban Extension (known as the "A6 allocation"). For example:

    a. At paragraphs 5.4-5.8 of the officer's report to Committee the emerging allocation is set out[32].

    b. At paragraph 5.13 one of the two key issues identified is whether *"it would be premature to grant permission given the site's allocation as part of the wider strategic allocation (A6) in the emerging JCS"*[33].

    c. At paragraph 18.3 an analysis is undertaken of the masterplan submitted by the applicant of the wider urban extension. That masterplan set out community facilities, local centre, new educational provision and play areas[34].

    d. At paragraph 20.4 Members are told to take into account the contribution to educational facilities, open space and playing pitches, health and community facilities and improvements to public transport as benefits of the scheme[35]. A fair reading of the Report would lead Members to conclude these benefits were the same benefits which were outlined at paragraph 18.3 as being delivered as part of this A6 allocation.

[32] Tab D/478-479
[33] Tab D/479
[34] Tab D/491
[35] Tab D/492

e. At paragraph 20.7 it is concluded that the planning application would complement the emerging A6 allocation[36].

47. It is therefore clear that planning permission was granted of the basis of the application forming an integral part of a broader urban development project, namely the A6 allocation. The wider social and economic benefits of that boarder development project formed a key part of the reasoning to grant permission. However, the full environmental effects of that broader project were not taken into account. Moreover, in a letter to the National Planning Casework Unit, the Leader of Cheltenham Borough Council stated that[37]:

> "*it [Cheltenham Borough Council] did object to development being brought forward in a piecemeal way, failing to adequately demonstrate its contribution to comprehensive master planning of the strategic allocation proposed by the submission JCS.*"

48. There is therefore no doubt the planning application before the Council and the remainder of the A6 allocation formed part of the *"same substantial development"* (per Davis LJ in Burridge) and was *"an integral part of an inevitably more substantial development"* (per Simon Brown J in Swale) but the environmental effects of that wider project were not assessed or taken into account by the decision taker. As such, it is submitted that the Defendant erred in law by failing to take account of "the environmental information" of the project, namely the significant environmental effects of the South Cheltenham Urban Extension.

49. In the alternative, it was irrational not to take account of the significant environmental effects of the wider allocation in the circumstances of the case because:

[36] *ibid*
[37] Tab D/546a-b

a. The balance of the South Cheltenham Urban Extension was also the subject of a simultaneous planning application. The entire project was therefore coming forward, simultaneously, under multiple applications.

b. The application was justified by the Defendant upon the social and economic benefits derived from the wider allocation, including those which would be delivered by the simultaneous planning application, see OR, 18.5 and were afforded *"substantial weight in favour of the scheme"* at OR, 20.4. These broader, unassisted benefits were therefore treated as positive benefits rather than, as the 1st Interested Party submits, simply being pointed out to *"[reassure] members that the application would not prejudice delivery of that broader draft allocation"*.

c. The Defendant thus irrationally took into account the social and economic benefits of the wider allocation without taking into account the environmental effects of that project.

d. Had planning permission been granted for the other part of the scheme as well, the environmental effects of the entire South Cheltenham Urban Extension would never have been assessed as a single urban development project.

50. This is a classic case of splitting what is in truth a single EIA project without assessing its cumulative environmental effects contrary to the Directive as explained by the ECJ in *Ecologistas*. The grant of permission was accordingly in breach of Regulation 3(4) EIA Regulations and should be quashed.

Ground 2 – Failure to take account of a material consideration including in its planning committee not reconsidering the matter

51. The fact the site was part of the emerging allocation in the JCS was a material matter before the planning committee. It formed part of the justification to grant planning permission. Furthermore, the Claimant's local green space allocation was dismissed as unlikely to succeed. Inspector Ord's December

2015 Preliminary Report bore heavily on both these matters, in that she found the site to be unsound in landscape impact terms and, the local green space allocation sound[38].

52. The Claimant's complaint is therefore simple: the Defendant failed to take into account a material consideration which shifted two fundamental assumptions upon which planning permission was resolved to be granted.

53. The 1st Interested Party's assertion that Inspector Ord's interim report was unlawful is irrelevant. Not only was that not any part of the reasoning for the matter not being reconsidered by the planning committee but, also and in any event, the Inspector's December 2015 Preliminary Report has not been challenged by judicial review (and is plainly too late to be challenged) and indeed a further May 2016 Interim Report, has been issued reinforcing the same findings as within the interim report.

54. The Defendant's answer, that Inspector Ord's analysis of landscape impact was "high level" and therefore irrelevant, is plainly no answer. Indeed, if the impact is so great as to be unsound for any allocation of housing, it would be startling if a decision taker did not pay the closest attention to that finding when determining a planning application. Inspector Ord had before her the landscape and visual impact evidence which informed the 1st Interested Party's planning application, and concluded that her view remained the same, and took the unusual step of concluding the allocation on the 1st Interested Party's site be removed from the JCS notwithstanding it benefitted from extant planning permission.

55. The Defendant's reference to the positions of Cotswolds Conservation Board and Natural England are nothing to the point. As Inspector Ord explained of her December Findings in her May Interim Report at IR, 113-114[39]:

[38] Tab D/564-590
[39] Tab D/793

> *"Whilst the Cotswolds Conservation Board did not object to the West of Farm Lane planning application, the Board commented that the most suitable option for the land's future management and retention of character would be to leave it undeveloped as agricultural land. Although Natural England in their letter of August 2015 stated they did not wish to comment, deferring to the Conservation Board's knowledge of the location, they did raise significant concerns over the impact on the AONB in their earlier letter of November 2014."*

> *"I also note that the Council's Landscape Officer referred to stunning views from Leckhampton Hill from the Devils Chimney and Cotswold Way, which would be negatively impacted, bringing the perception of the southern edge of Cheltenham closer to the viewer with a greater mass of conurbation in view. In my judgement, development on the West of Farm Lane site is environmentally unsustainable mainly due to its impact on the setting of the Cotswold Hills AONB and the high landscape and visual sensitivity of the site."*

56. Accordingly, in the Claimant's submission, the Inspector's findings on landscape could, notwithstanding the views of the AONB Board and Natural England have had a material bearing on the Defendant's planning committee had they been afforded the opportunity to take them into account.

57. In responding to the Claimant's letter of claim, the Defendant offers no defence as to why the Inspector's findings on the local green space proposal were not referred back to the Committee. In the Claimant's submission that silence is revealing of the fact there is simply no sensible explanation as to why the matter was not referred back to the planning committee when the Inspector determining the local green space came to a diametrically opposite view to that which Members were advised within officer's report at paragraphs 19.2-19.5. In particular the following advice within the Officer's Report was overtaken following Inspector Ord's December Findings[40]:

> *"The emerging JCS considered that whilst there is clearly a strong need for strategic green infrastructure and effective and useful green and amenity space as part of the development, these requirements do not outweigh the value of a sustainable urban extension to this part of Cheltenham ...*

[40] Tab D/492

The NPPF advises that LGS designation would rarely be appropriate where the land has planning permission for development. Whilst not specifically referred, it is reasonable to expect that a LGS designation allocation would also rarely be appropriate for an existing residential site allocation."

58. The 1st Interested Party's response that the Defendant was performing a planning balance as to the comparative benefit of a LGS in this location as against the urban extension is not born out by the terms in which it is drafted. In any event, Inspector Ord's findings as to the overall soundness of part of the allocation overtook that balance.

59. Applying *Kides*: (i) the Defendant was aware of a new factor, Inspector Ord's Preliminary Findings yet (ii) there is no evidence the Defendant considered the Findings with the 1st Interested Party's application in mind, and (iii) it cannot be said the Defendant's planning committee *"would reach (not might reach) the same conclusion"* to grant permission on such a fundamental change of context.

60. The Defendant therefore unlawfully granted planning permission in breach of s.70(2) Town and Country Planning Act 1990 by failing to have regard to a highly material consideration including in its planning committee not reconsidering the matter.

Ground 3: Breach of s.66(1) Planning (Listed Buildings and Conservation Areas) Act 1990

61. The Claimant's complaint under this Ground is simple: the Defendant unlawfully equated the less the substantial harm to a less than substantial objection to the grant of planning permission. That was contrary to the statutory duty at s.66(1) of the 1990 Act[41] as explained by the Court of Appeal in *East Northamptonshire*.

[41] Tab E/2

62. Members of the planning committee were not told of the statutory duty at any point or of the approach of national policy towards listed buildings and their settings ("designated heritage assets"). That omission, coupled with the perfunctory way the harm is treated within the report, is compounded by the positively misleading policy advice at paragraph 16.1[42] that:

> *"The NPPF advises that the effect of an application on the significance of a non-designated heritage asset should be taken into account in determining the application. In weighing the applications that affect directly or indirectly non-designated heritage assets, a balanced judgment will be required having regard to the scale of any harm or loss and the significance of the heritage asset".*

63. That advice relates to non-designated heritage assets, to which the statutory duty does not apply. It had no relevance whatsoever for weighing the harm, however limited it is said to be to the setting of the three Grade II listed buildings, against the public benefits of the scheme.

64. Accordingly, in the absence of proper direction and in the presence of a misdirection, the only proper inference is that Members were seriously mislead as to the proper approach to assessing the setting impact on listed buildings. As Sales LJ explains in *Jones* at [27] the obiter comments in *Forge Field* and *East Northamptonshire* remain good law in circumstances where the reasons (in this case the Officer's Report) contained: "*positive indications that the decision-maker had failed to comply with the duty under section 66(1) of the Listed Buildings Act".*

65. Accordingly, the Defendant breached s.66(1) of the 1990 Act by failing to direct Members as to the importance and weight to be attached to the preservation of the setting of the listed buildings, and further positively misled Members into thinking the standard was a simple balance without any particular importance or weight being attached to the harm to the heritage asset.

[42] Tab D/488

Ground 4: Failure to correctly apply the presumption in favour of planning permission at paragraph 14 NPPF

66. Paragraph 134 NPPF provides as follows:[43]

> *"Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use."*

67. The Officer's Report does not come to any conclusion as to the harm to the heritage assets versus the public benefits in accordance with paragraph 134 NPPF, within the "Archaeology and Cultural Heritage" section of the Report. Rather a tentative suggestion is made at OR, 16.3 that:

> *"The listed buildings at Leckhampton Farm Court, comprising Leckhampton Farmhouse and the Barn would experience temporary moderate and permanent moderate/minor adverse effects arising out of impacts to their wider setting and likely to require moderate development scheme benefits to balance the harm."*

68. A conclusion is however reached within the "Overall Balancing Exercise" section which provides[44]:

> *"20.1 … The NPPF therefore requires the Council considers applications for housing the context of a presumption in favour of sustainable development …"*
>
> *20.5 With regard to the environmental dimension … this development would result in less than substantial harm to the settings of listed buildings in close proximity to the site …"*
>
> *20.8 The NPPF sets out at paragraph 14 that in the context of the presumption in favour of sustainable development, proposed development that accord [sic] with the development plan should be approved without delay. Where the development plan is absent, silent or relevant policies are out-of-date, permission should be granted unless, inter alia, any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the Framework as a whole.*

[43] Tab E/4
[44] Tab D/492-493

20.9 Whilst the proposal would result in harm to the character and appearance of the area it is concluded that the identified harm would not significantly and demonstrably outweigh the benefits of the proposals and the scheme represents sustainable development for which there is a presumption in favour"

69. Where that advice is defective, is that it fails to recognise that harm to heritage assets is a situation to which the NPPF, paragraph 14 indicates development should be restricted: see footnote 9, paragraph 14 NPPF[45].

70. Accordingly, the Defendant erred in law in the said same manner identified by Coulson J. in *Forest of Dean* at [47], by failing to first weigh the harm to the heritage assets (having regard to the statutory duty at s.66(1) of the 1990 Act) against the public benefits of the proposal, outside of the paragraph 14 NPPF balance, that is to say in an un-weighted manner. Before proceeding to carry forward any residual harm arising from that balancing exercise into the weighted, paragraph 14 NPPF, balance, weighted in favour of the grant of planning permission.

71. In its reply to the Claimant's letter of claim, the Defendant has offered no answer to this allegation, and in the Claimant's submission that is because the complaint is unanswerable. The Defendant failed to understand and then correctly apply national planning policy. The Defendant therefore erred in law.

Conclusion

72. The Claimant's claim is plainly (at least) arguable on the above grounds.

73. The Claimant therefore seeks permission for judicial review at the substantive hearing of which it will seek declarations that the decision to grant planning permission and the planning permission were unlawful (as above) and an order

[45] Tab E/4

quashing the Decision and the planning permission for any or all of the above Grounds and costs.

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